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TM Global Marine Sdn Bhd (formerly known as Smart Work Co-Ordinating Sdn Bhd) v Thermatek Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN PERSONAM NO WA-27NCC-29–03 OF 2020
ATAN MUSTAFFA JC
30 AUGUST 2021

C

Contract — Discharge — Performance of promise by third person — Defendant had back-to-back charterparty agreements with plaintiff and third party — Defendant failed to pay hire charges to plaintiff because it did not receive payments from third party — Plaintiff issued 'stop-work' order on charterparty D *vessels until third party had paid its debt to defendant — Third party instead directly paid plaintiff amount owing to it by defendant to get 'stop-work' order lifted — Plaintiff accepted payment but defendant objected to the arrangement — Plaintiff refunded the monies to third party and sued defendant for its debt — Whether defendant could claim its debt to plaintiff had been discharged by* E *plaintiff's acceptance of payment from third party — Whether s 42 of Contracts Act 1950 applied — Whether plaintiff was estopped from suing defendant for its debt — Whether third party's payment to plaintiff was merely convenient payment arrangement to get 'stop-work' order lifted and not assumption of defendant's legal obligation to pay plaintiff under its contract — Whether defendant had failed to* F *prove its case that plaintiff had conspired with third party to injure it by lawful means — Evidence Act 1950 s 115*

The defendant entered into back-to-back charterparty agreements with the plaintiff, on the one hand, and KP Port Services Sdn Bhd ('KPPS') on the G other. This arrangement enabled the plaintiff to time-charter vessels from their owners for charter to the defendant which, in turn, chartered the vessels to KPPS. As the hire charges owing by the defendant to the plaintiff grew into a substantial amount, the plaintiff met with the defendant and KPPS to reach an agreement that KPPS would settle the RM1,960,178.76 it owed the defendant H ('the KPPS debt') and that when the defendant-KPPS charterparty agreement expired, KPPS would deal directly with the plaintiff for the supply of vessels. KPPS failed to settle the KPPS debt as agreed, causing the plaintiff to issue a 'stop-work' order on the vessels. In order to have the 'stop-work' order lifted expeditiously, KPPS proposed that it would directly pay the plaintiff what was I owing to it by the defendant. KPPS then divided the KPPS debt into two — a cheque for RM1,694,593.85 ('the KPPS payment') in favour of the plaintiff (which the plaintiff collected and accepted) and another cheque in favour of the defendant for the balance RM265,584.91 (which the defendant did not collect). The defendant disputed the 'split payment arrangement' saying that it

never agreed to it and that the actual amount the defendant owed the plaintiff was yet to be determined. The defendant also contended that KPPS was obliged to pay the whole KPPS debt directly to it and not decide on its own to apportion a part of that sum to settle the plaintiff's debt. When the plaintiff came to know of the defendant's objection to the arrangement, it returned the KPPS payment to KPPS and demanded that the defendant settle its debt under the plaintiff-defendant charterparty agreement (by this time, KPPS, upon receiving the refund from the plaintiff, had fully settled the KPPS debt with the defendant). The defendant did not respond to the demand. The plaintiff then commenced arbitration proceedings against the defendant but by mutual agreement, the parties decided to resolve their dispute by way of the instant action in which the plaintiff claimed the sum of RM1,608,301.29 from the defendant. The defendant denied the claim saying that pursuant to s 42 of the Contracts Act 1950, the plaintiff's acceptance of the KPPS payment fully discharged the defendant of its debt to the plaintiff and that the plaintiff was estopped from making the instant claim. The defendant also contended that the plaintiff's refund of the KPPS payment without the defendant's knowledge or approval could not in law or equity revive the debt that was claimed by the plaintiff. Further, the defendant raised a counterclaim for damages on the ground that the plaintiff had conspired with KPPS, specifically its then Executive Director/Chief Executive Officer ('Wong') to injure the defendant by lawful means, ie by creating a situation where the defendant would default on its payments to the plaintiff and be forced to withdraw from the charterparty agreements so that the plaintiff could deal directly with KPPS in future without involving the defendant any more. The plaintiff argued that s 42 of the Contracts Act had no application because the defendant never agreed to the 'split payment arrangement'. The plaintiff said it accepted the KPPS payment in the honest belief that the defendant was agreeable to it and that it was merely a convenient arrangement to resolve the impasse and allow the vessels to continue operating without further interruption in the interest of KPPS. The plaintiff said the acceptance of the KPPS payment was never intended to alter the respective contractual positions of the parties under their charterparty agreements or to prejudice their rights and remedies thereunder. The plaintiff maintained that the defendant's obligation to pay under its contract with the plaintiff subsisted and was unaffected by its temporary acceptance of the KPPS payment. With regard to the counterclaim, the plaintiff denied that it had conspired in any way with KPPS to injure the defendant.

Held, allowing the plaintiff's claim for RM1,608,301.29 and dismissing the defendant's counterclaim:

(1) The defendant's debt under the TM Global-Thermatek charterparty was not discharged when the plaintiff accepted the KPPS payment. With the defendant's objection to the 'split payment arrangement' and its stand

A that all amounts owing by KPPS to the defendant had to be settled with the defendant only and not any other third party, it became clear that there was no basis for KPPS to make the payment even as a payment arrangement and not pursuant to an agreement for KPPS to substitute the defendant on its obligation to pay the plaintiff. Under the B circumstances, s 42 of the Contracts Act 1950 could not bite as the basis for making the payment was not there in the first place (see paras 80 & 83).

(2) The defendant's submission that there was ratification was unacceptable. C Ratification was never pleaded nor alluded to by the defendant's witness (Roslan) in his evidence. Neither was the plaintiff's witness (Capt Malim) cross-examined on this point. In any event, the defendant's submission that there was implied ratification when the defendant did not remonstrate any further with KPPS after the plaintiff had accepted the D KPPS payment was inconsistent with the defendant's objection to the split payment. Suing KPPS was also consistent with the defendant's remonstration as it was the defendant's stated position that all amounts owing by KPPS to the defendant should be settled with the defendant and not with any other third party (see paras 81–82).

E (3) The plaintiff's refund of the KPPS payment was a genuine refund under the split payment arrangement. This was stated in the plaintiff's solicitor's letter accompanying the refund. The refund was not made for any other reason. In his affidavit, Capt Malim stated that the money was refunded 'on the genuine understanding and legitimate expectation that F the defendant will pay them the sums due under the TM Global-Thermatek charterparty ...'. The court accepted Capt Malim's explanation that the KPPS payment was refunded only after eight months because the defendant had commenced arbitration proceedings against KPPS for full payment of its debt and the parties entered into G without-prejudice negotiations to decide how to amicably resolve the matter until it was agreed that the plaintiff refund the KPPS payment and KPPS would pay the defendant under the arbitration proceedings which KPPS did in May 2019 (see paras 94–95).

H (4) On the issue of whether the refund of the KPPS payment revived the defendant's debt to the plaintiff, the court found that the defendant's debt to the plaintiff was not discharged pursuant to s 42 of the Contracts Act and under the doctrine of ratification, thus there was no question of reviving a debt which was never discharged (see para 96).

I (5) The plaintiff's acceptance of the KPPS payment did not operate as an estoppel that barred it from suing the defendant for settlement of its debt. The defendant did not satisfy the pre-requisites to bring the case within the scope of estoppel under s 115 of the Evidence Act 1950. The defendant did not agree to the split payment arrangement and did not

believe or rely upon that arrangement to act to its prejudice or detriment. This was apparent from the defendant's pleaded case and the 25 August 2018 letter stating that it did not agree to the split payment arrangement. The defendant did not believe that its debt to the plaintiff had been discharged by the KPPS payment. This was borne out by the defendant's conduct after the KPPS payment was made when the defendant commenced arbitration proceedings against KPPS for its full claim of RM1.96m (see paras 106–109 & 175).

(6) The court would not draw an adverse inference against the plaintiff for not calling Wong and Dato' Tan of KPPS as witnesses to prove its claim and to defend the counterclaim. The main issue in the plaintiff's claim was whether the KPPS payment discharged the defendant's liability to the plaintiff pursuant to s 42 of the Contracts Act 1950. This involved a legal analysis rather than proof of facts for which the evidence of witnesses was crucial. The reason why the KPPS payment was made was fully explained by Capt Malim. The defendant had not explained why Wong's evidence was important in this respect. The plaintiff had proved its case through the production of contemporary documents and the testimony of Capt Malim. As for the counterclaim, since the defendant had failed to prove its case for conspiracy , the non-calling of Wong and Dato' Tan could not be taken as the withholding of unfavourable evidence under s 114(g) of the Evidence Act 1950 (see paras 120–122 & 174–175).

(7) The defendant's contention that the plaintiff's claim was barred by laches was unacceptable. Like the issue of ratification, laches was never pleaded and there was no allusion to it in the defendant's evidence nor was the plaintiff's witness cross-examined on this point. In any event, the eight months it took for the plaintiff to refund the KPPS payment was not a long time, for, after it made the refund, the plaintiff commenced arbitration proceedings against the defendant before changing the forum of the dispute to the High Court. The plaintiff's witness, Capt Malim, had also adequately explained that the delay was caused by the parties being engaged in without-prejudice discussions to resolve their disputes (see paras 125–126).

(8) The defendant failed on balance of probabilities to prove its counterclaim that the plaintiff had conspired with KPPS/Wong to injure it by lawful means. The scant circumstantial evidence provided by the defendant in this regard was insufficient for the court to draw an inference that there was such a conspiracy (see paras 170 & 175).

[Bahasa Malaysia summary

Defendan menandatangani perjanjian *charterparty* (sewaan kapal) berturut-turut dengan plaintif, di satu pihak, dan KP Port Services Sdn Bhd

A ('KPPS') di pihak yang lain. Aturan ini membolehkan plaintif menyewa kapal-kapal daripada pemiliknya untuk disewa kepada defendan yang seterusnya menyewa kapal-kapal tersebut kepada KPPS. Oleh kerana caj sewaan yang terhutang oleh defendan kepada plaintif meningkat menjadi jumlah yang besar, plaintif telah berjumpa dengan defendan dan KPPS untuk B mencapai persetujuan bahawa KPPS akan menyelesaikan RM1,960,178.76 yang terhutang dengan defendan ('hutang KPPS') dan bahawa apabila perjanjian *charterparty* defendan-KPPS tamat, KPPS akan berurusan terus dengan plaintif untuk pembekalan kapal. KPPS gagal menjelaskan hutang KPPS seperti yang dipersetujui menyebabkan plaintif mengeluarkan arahan C 'berhenti kerja' ke atas kapal berkenaan. Bagi membolehkan perintah 'berhenti kerja' ditarik balik dengan cepat, KPPS mencadangkan bahawa ia akan membayar terus plaintif apa yang terhutang oleh defendan. KPPS kemudiannya membahagikan hutang KPPS kepada dua — cek berjumlah RM1,694,593.85 ('bayaran KPPS') terhadap plaintif (yang diambil dan D diterima oleh plaintif) dan satu lagi cek terhadap defendan untuk baki RM265,584.91 (yang tidak diambil oleh defendan). Defendan mempertikaikan 'aturan pecahan pembayaran' dengan mengatakan bahawa ia tidak pernah bersetuju dengannya dan jumlah sebenar defendan terhutang kepada plaintif masih belum ditentukan. Defendan juga berpendapat bahawa E KPPS bertanggungjawab untuk membayar keseluruhan hutang KPPS secara terus kepadanya dan tidak memutuskan sendiri untuk membahagikan sebahagian daripada jumlah tersebut untuk menyelesaikan hutang plaintif. Apabila plaintif mengetahui bantahan defendan terhadap aturan tersebut, ia memulangkan bayaran KPPS kepada KPPS dan menuntut defendan F menyelesaikan hutangnya di bawah perjanjian *charterparty* plaintif-defendan (pada masa ini, KPPS, setelah menerima bayaran balik daripada plaintif, telah menyelesaikan sepenuhnya hutang KPPS dengan defendan). Defendan tidak menjawab tuntutan tersebut. Plaintif kemudiannya memulakan prosiding timbang tara terhadap defendan tetapi dengan persetujuan bersama, G pihak-pihak memutuskan untuk menyelesaikan pertikaian mereka melalui tindakan semasa di mana plaintif menuntut sejumlah RM1,608,301.29 daripada defendan. Defendan menafikan tuntutan tersebut dengan mengatakan bahawa menurut s 42 Akta Kontrak 1950, penerimaan plaintif terhadap bayaran KPPS telah melunaskan sepenuhnya hutang defendan H kepada plaintif dan bahawa plaintif telah dihalang daripada membuat tuntutan semasa. Defendan juga berpendapat bahawa pembayaran balik bayaran KPPS oleh plaintif tanpa pengetahuan atau kelulusan defendan tidak boleh di sisi undang-undang atau ekuiti memulihkan hutang yang dituntut oleh plaintif. Selanjutnya, defendan membangkitkan tuntutan balas untuk ganti rugi atas I alasan bahawa plaintif telah bersubahat dengan KPPS, khususnya Pengarah Eksekutif/Ketua Pegawai Eksekutif ('Wong') ketika itu untuk merugikan defendan dengan cara yang sah, iaitu dengan mewujudkan situasi di mana defendan akan memungkiri pembayarannya kepada plaintif dan terpaksa menarik diri daripada perjanjian carterparty supaya plaintif boleh berurusan

terus dengan KPPS pada masa hadapan tanpa melibatkan defendan lagi. Plaintif berhujah bahawa s 42 Akta Kontrak tidak terpakai kerana defendan tidak pernah bersetuju dengan 'aturan pecahan pembayaran'. Plaintif berkata ia menerima bayaran KPPS dengan kepercayaan jujur bahawa defendan bersetuju dengannya dan ia hanyalah satu aturan yang mudah untuk menyelesaikan kebuntuan dan membenarkan kapal tersebut terus beroperasi tanpa gangguan lagi demi kepentingan KPPS. Plaintif berkata penerimaan bayaran KPPS tidak sekali-kali bertujuan untuk mengubah kedudukan kontrak semua pihak di bawah perjanjian carterparty mereka atau memprejudiskan hak dan remedi mereka di bawahnya. Plaintif menegaskan bahawa kewajipan defendan untuk membayar di bawah kontraknya dengan plaintif tetap wujud dan tidak terjejas dengan penerimaan sementara bayaran KPPS. Berkenaan dengan tuntutan balas, plaintif menafikan bahawa ia telah bersubahat dalam apa cara sekalipun dengan KPPS untuk merugikan defendan.

Diputuskan, membenarkan tuntutan plaintif sebanyak RM1,608,301.29 dan menolak tuntutan balas defendan:

(1) Hutang defendan di bawah carterparty TM Global-Thermatek tidak dilunaskan apabila plaintif menerima bayaran KPPS. Dengan bantahan defendan terhadap 'aturan pecahan pembayaran' dan pendiriannya bahawa semua jumlah yang terhutang oleh KPPS kepada defendan perlu diselesaikan dengan defendan sahaja dan bukan mana-mana pihak ketiga yang lain, ia adalah jelas bahawa tiada asas untuk KPPS membuat bayaran tersebut walaupun sebagai aturan pembayaran dan bukan menurut perjanjian untuk KPPS menggantikan defendan atas kewajipannya membayar plaintif. Dalam keadaan itu, s 42 Akta Kontrak 1950 tidak terpakai kerana asas untuk membuat pembayaran tidak ada pada mulanya (lihat perenggan 83 & 80).

(2) Hujahan defendan bahawa terdapat ratifikasi adalah tidak boleh diterima. Ratifikasi tidak pernah diplidkan atau disebutkan oleh saksi defendan (Roslan) dalam keterangannya. Saksi plaintif (Kapten Malim) juga tidak disoal balas mengenai perkara ini. Walau apa pun, hujahan defendan bahawa terdapat ratifikasi tersirat apabila defendan tidak membuat bantahan lanjut dengan KPPS selepas plaintif telah menerima bayaran KPPS adalah tidak konsisten dengan bantahan defendan terhadap pecahan pembayaran tersebut. Menyaman KPPS juga konsisten dengan bantahan defendan kerana ia adalah pendirian defendan bahawa semua jumlah terhutang oleh KPPS kepada defendan hendaklah diselesaikan dengan defendan dan bukan dengan mana-mana pihak ketiga yang lain (lihat perenggan 81–82).

(3) Bayaran balik plaintif bagi bayaran KPPS adalah bayaran balik tulen di bawah aturan pecahan pembayaran. Ini dinyatakan dalam surat peguam

cara plaintif yang mengiringi bayaran balik. Bayaran balik tidak dibuat atas sebab lain. Dalam afidavitnya, Kapten Malim menyatakan bahawa wang tersebut telah dikembalikan 'atas fahaman yang tulen dan jangkaan yang sah bahawa defendan akan membayar mereka jumlah yang perlu dibayar di bawah *charterparty* TM Global-Thermatek ...'. Mahkamah menerima penjelasan Kapten Malim bahawa pembayaran KPPS dibayar balik hanya selepas lapan bulan kerana defendan telah memulakan prosiding timbang tara terhadap KPPS untuk pembayaran penuh hutangnya dan pihak-pihak mengadakan rundingan tanpa prejudis untuk memutuskan cara menyelesaikan perkara tersebut secara baik sehingga dipersetujui bahawa plaintif membayar balik bayaran KPPS dan KPPS akan membayar defendan di bawah prosiding timbang tara yang KPPS lakukan pada Mei 2019 (lihat perenggan 94–95).

(4) Mengenai isu sama ada pemulangan bayaran KPPS menghidupkan semula hutang defendan kepada plaintif, mahkamah mendapati bahawa hutang defendan kepada plaintif tidak dilunaskan menurut s 42 Akta Kontrak dan di bawah doktrin ratifikasi, maka tidak timbul persoalan untuk menghidupkan hutang yang tidak pernah dilunaskan (lihat perenggan 96).

(5) Penerimaan plaintif terhadap bayaran KPPS tidak berfungsi sebagai estoppel yang menghalangnya daripada menyaman defendan untuk menyelesaikan hutangnya. Defendan tidak memenuhi pra-syarat untuk membawa kes dalam skop estoppel di bawah s 115 Akta Keterangan 1950. Defendan tidak bersetuju dengan aturan pecahan pembayaran dan tidak percaya atau bergantung kepada aturan tersebut untuk bertindak terhadap prejudis atau kemudaratannya. Ini jelas daripada kes yang diplidkan defendan dan surat 25 Ogos 2018 yang menyatakan bahawa ia tidak bersetuju dengan aturan pecahan pembayaran. Defendan tidak percaya bahawa hutangnya kepada plaintif telah dilangsaikan melalui pembayaran KPPS. Ini terbukti dengan kelakuan defendan selepas pembayaran KPPS dibuat apabila defendan memulakan prosiding timbang tara terhadap KPPS untuk tuntutan penuhnya sebanyak RM1.96 juta (lihat perenggan 106–109 & 175).

(6) Mahkamah tidak akan membuat anggapan bertentangan terhadap plaintif kerana tidak memanggil Wong dan Dato' Tan KPPS sebagai saksi untuk membuktikan tuntutannya dan untuk membela tuntutan balas tersebut. Isu utama dalam tuntutan plaintif adalah sama ada bayaran KPPS melepaskan liabiliti defendan kepada plaintif menurut s 42 Akta Kontrak 1950. Ini melibatkan analisis undang-undang dan bukannya bukti fakta yang mana keterangan saksi adalah penting. Sebab pembayaran KPPS dibuat telah dijelaskan sepenuhnya oleh Kapt Malim. Defendan tidak menjelaskan mengapa keterangan Wong penting dalam hal ini. Plaintif telah membuktikan kesnya melalui pengeluaran

dokumen kontemporari dan keterangan Kapten Malim. Bagi tuntutan balas, oleh kerana defendan gagal membuktikan kesnya untuk konspirasi, kegagalan memanggil Wong dan Dato' Tan tidak boleh dianggap sebagai penahanan bukti yang tidak memberi faedah di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 120–122 & 174–175).

(7) Pendapat defendan bahawa tuntutan plaintif telah dihalang oleh laches adalah tidak boleh diterima. Seperti isu ratifikasi, laches tidak pernah diplidkan dan tidak disebut mengenainya dalam keterangan defendan mahupun saksi plaintif disoal balas mengenai perkara ini. Walau apa pun, lapan bulan yang diambil oleh plaintif untuk memulangkan bayaran KPPS bukanlah suatu masa yang lama, kerana, selepas ia membuat bayaran balik, plaintif memulakan prosiding timbang tara terhadap defendan sebelum menukar forum pertikaian kepada Mahkamah Tinggi. Saksi plaintif, Kapten Malim, juga menjelaskan dengan secukupnya bahawa kelewatan tersebut disebabkan oleh pihak-pihak yang terlibat dalam perbincangan tanpa prejudis untuk menyelesaikan pertikaian mereka (lihat perenggan 125–126).

(8) Defendan gagal atas imbangan kebarangkalian untuk membuktikan tuntutan balasnya bahawa plaintif telah bersubahat dengan KPPS/Wong untuk merugikannya dengan cara yang sah. Kurangnya keterangan mengikut keadaan yang diberikan oleh defendan dalam hal ini tidak mencukupi untuk mahkamah membuat kesimpulan bahawa terdapat konspirasi sedemikian (lihat perenggan 170 & 175).]

Cases referred to

Amusu Properties Sdn Bhd v Muruchadayah s/o AMS Pillay [1989] 1 MLJ 451, HC (refd)

Boustead Trading (1985) Sdn Bhd Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331, CA (refd)

Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303; [1998] 2 MLRA 272, CA (refd)

Chinn Swee Onn v Puchong Realty Sdn Bhd [1990] 1 MLJ 108, SC (distd)

Chong Hee v Credit Corporation (Malaysia) Berhad [1999] MLJU 456; [1999] 5 MLRH 782, HC (refd)

Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797; [2016] 3 CLJ 676, CA (refd)

Deepak Jaikishan a/l Jaikishan Rewachan & Anor v Intrared Sdn Bhd & Anor [2013] 7 MLJ 437, HC (refd)

Eagaivallinayagi Ammal v Chin Min Hua & Ors [2020] 2 MLJ 771; [2020] 4 CLJ 64, CA (refd)

Foo Yong v Sui Diong Hoe [2018] MLJU 1173, HC (refd)

Gan Kui Lan @ Gan Kee Lan v Chia Kar Loong (No 1) [2002] MLJU 352; [2002] 7 CLJ 141, HC (refd)

Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Jaafar [1975] 2 MLJ 82, FC (distd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Megat Sharizat bin Megat Shahrur [2013] 3 MLJ 227, FC (refd)
PP v Sarjit Kaur a/p Najar Singh [1998] 1 MLJ 184; [1997] 4 MLRH 685, HC (refd)
Punj Lloyd Sdn Bhd v Ramo Industries Sdn Bhd & Anor and another case [2019] 11 MLJ 574, HC (refd)
Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn Bhd & Anor [1985] 1 MLJ 73 (refd)
Seagate Global Trading Sdn Bhd v Pelita Maintenance Resources Sdn Bhd & Ors [2019] MLJU 1002; [2020] 1 MLRH 6154, HC (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253, CA (refd)
Sha Kannan & Anor v Arunachalam a/l Venkatachalam & Anor and another appeal [2017] MLJU 1568; [2017] 1 LNS 2036, HC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)
Thong Foo Ching v Shigenori Ono [1988] 4 MLJ 585, CA (refd)
V Veeriah General Manager, Keretapi Tanah Melayu [1974] 1 MLJ 201, HC (refd)
WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 QB 189, CA (refd)

Legislation referred to

Contracts Act 1950 ss 41, 42, 149, 150
Evidence Act 1950 ss 114(g), 115

Jeremy M Joseph (Joseph & Partners) for the plaintiff.
Mohan Kang (Kang & Kang) for the defendant.

Atan Mustaffa JC:

[1] The trial of this action concerns the plaintiff's claim for a debt under a charterparty of vessels between the plaintiff as disponent owners of the vessels and the defendant as charterers of the vessel. Arising from the facts of the case, the defendant also has a counterclaim against the plaintiff for damages for loss of charterparty fees and hire of the cessels founded on the tort of conspiracy to injure by lawful means.

BACKGROUND FACTS

[2] The plaintiff and the defendant started a business relationship sometime in 2016 when the defendant would approach the plaintiff to hire barges on a trip rate basis to transport quarry products from the defendant's quarry operations in Terengganu to the defendant's customers' sites. At this

time, the plaintiff was known as 'Smart Work Co-Ordinating Sdn Bhd'. The plaintiff's name was changed subsequently to 'TM Global Marine Sdn Bhd' on 7 October 2018.

[3] In September 2017, the defendant was invited by KP Port Services Sdn Bhd ('KPPS') to quote for the hire of a Floating Crane for Kuantan Port. The plaintiff informed the defendant of vessels that were available and suitable for this purpose, namely the FC Sumber and Barge TC Sumber Power VIII. At this time, the CEO of KPPS was Dato Hj Khasbullah bin A Kadir ('Dato Hj Khasbullah').

[4] The plaintiff agreed to time charter these vessels from the owner of the vessels and then onward time charter them to the defendant. The defendant would in turn charter the vessels to KPPS.

[5] By a letter of award dated 16 March 2018, KPPS granted the contract to the defendant and the defendant entered into back-to-back charterparties with the plaintiff and KPPS for the charter of the said vessels. The defendant continued to charter the vessels to KPPS for approximately one month but by 25 April 2018, the charterparties had to be mutually terminated as the vessel size and capacity was not suitable to perform the required job. It was agreed for the defendant to source for more suitable vessels with greater capacity.

[6] The plaintiff had ready and available vessels for the job, ie the Floating Crane Barge, 'Toll Suralaya' and Tugboat, 'Whale 7' (together referred as 'the vessels') and offered the vessels to the defendant which was accepted by the defendant. The defendant in turn offered the vessels to KPPS who agreed to take up these alternative vessels.

[7] KPPS then issued a letter of award to the defendant on 14 May 2018 ('the KPPS contract'). On 18 May 2018, the plaintiff and the defendant entered into two back-to-back charterparties for the hire of the vessels which are:

(a) BIMCO Supplytime 2017 Time Charter Party For Offshore Support Vessels between Smart Work Co-Ordinating Sdn Bhd and Thermatek Sdn Bhd dated 17 May 2018 ('the TM Global-Thermatek Charterparty'); and

(b) BIMCO Supplytime 2017 Time Charter Party For Offshore Support Vessels between Thermatek Sdn Bhd and KP Port Sevices Sdn Bhd dated 18 May 2018 ('the Thermatek-KPPS Charterparty').

[8] The charter under the TM Global-Thermatek Charterparty was for a minimum charter period of three months beginning 18 May 2018–17 August

2018 at a charter hire on the vessels on terms and conditions thereunder. The vessels were delivered to the defendant on 18 May 2018 in Batam, Indonesia, and thereafter mobilised to Kuantan Port and performed the KPPS contract.

[9] On 1 July 2018 Dato Hj Khasbullah was replaced by a Mr Wong Soon Fah ('Mr Wong') who held the position of CEO/Executive Director.

[10] The plaintiff sent an email on 27 July 2018 to KPPS which was copied to the defendant, requesting 'an appointment with you and member of your staffs & Encik Roslan from Thermatek Sdn Bhd on Monday 30 July 2018'. 'En Roslan' here refers to En Roslan bin Hasan ('En Roslan'), a director of the defendant who was the defendant's witness (DW1) for the trial. The venue stated for the meeting was KPPS's office and the items for discussion stated in the email, which were related to the TM Global-Thermatek Charterparty, were:

1. Invoice claims from May-July 2018
2. Payment status
3. Contract end on 17.8.2018
4. Other issues.

[11] The meeting on 30 July 2018 was attended only by KPPS's representative and Capt Malim bin Mohd Sah ('Capt Malim'), the plaintiff's director, who was the defendant's witness (PW1) for the trial. En Roslan did not attend and the meeting was adjourned.

[12] The next day, on 31 July 2018 the plaintiff issued a notice stating that it will not be renewing the TM Global-Thermatek Charterparty and the reason for the non-renewal is 'due to the payment issues'. In the same email, the plaintiff asked the defendant to contact it if the defendant wished to discuss the matter. There was no response to the email of 31 July 2018 or any communication from the defendant.

[13] On 30 July 2018, the plaintiff issued a notice of meeting on 6 August 2018 via an email which was addressed to, amongst others, Capt Malim and En Roslan. The items for discussion stated in the email were:

1. Contract (ending 17/8/2018)
2. Payment issues
3. Other issues

[14] At the meeting on 6 August 2018 ('the 6 August 2018 meeting'), KPPS, represented by Mr Wong, the defendant, represented by En Roslan and the plaintiff represented by Capt Malim and Dato' Tan Peng Chai ('Dato' Tan'), the Managing Director of the plaintiff, were present. It was agreed during the meeting that:

(a) the termination of the Thermatek-KPPS Charterparty on 18 August 2018 is subject to the outstanding amount of RM1,960,178.76 that was owed to be paid by KPPS to the defendant; and

(b) KPPS will contract directly with the plaintiff for the supply of the vessels by extending the Charterparty between the defendant and KPPS by one month from 19 August 2018–18 September 2018 ('the extension contract').

[15] Subsequent to the 6 August 2018 meeting, KPPS issued a letter of appointment to the plaintiff dated 6 August 2018. En Roslan signed the acceptance of this arrangement by signing on the 'Agreement by Thermatek Sdn Bhd' page. A payment of RM800,000 was made by KPPS to the defendant also on 6 August 2018. No payment was made to the plaintiff.

[16] The plaintiff on 11 August 2018 ('the 11 August 2018 notice') issued a notice to withdraw the vessels, but subsequently another notice was issued on 13 August 2018 that the vessels will be suspended from performance under cl 12(f)(i) of the TM Global-Thermatek Charterparty with effect from 13 August 2018 until the outstanding hire is paid in full ('the stop-work order'). Then on 13 August 2018, KPPS called for a meeting with the plaintiff and the defendant on 15 August 2018 to resolve the stop-work order and issue of non-payment.

[17] At the meeting on 15 August 2018 ('the 15 August 2018 meeting') KPPS confirmed the sum of RM1,960,178.76 being the sum due and owing by KPPS to the defendant under Thermatek-KPPS Charterparty. KPPS also acknowledged that this sum was still not paid and agreed to pay the defendant this amount.

[18] Additionally, KPP proposed that the sum, of RM1,960,178.76 be split between what was owed to the plaintiff (under the TM Global-Thermatek Charterparty) and the defendant (under Thermatek-KPPS Charterparty) and paid to the parties proportionately ('the split payment arrangement'). The split would be as follows:

(a) RM1,694,593.85, the balance sum due and owing by the defendant to the plaintiff under the TM Global-Thermatek Charterparty, would be paid directly by KPPS to the plaintiff as the sum estimated to be due and

payable by the defendant to the plaintiff under the TM Global-Thermatek Charterparty; and

(b) the balance sum of RM265,584.91 would be paid to the defendant.

[19] Upon payment as above, the vessels will resume providing the services required for the KPPS contract.

[20] After the 15 August 2018 meeting, KPPS sent a letter dated 20 August 2018 ('the 20 August 2018 letter') setting out the discussions and decisions in the 15 August 2018 meeting for the confirmation of all parties. In this letter, KPPS stated that, among other things, there was an amount of RM1,694,593.85 due and owing from the defendant to the plaintiff, and that KPPS shall directly pay the defendant the reduced payment of the outstanding amount to the defendant. The defendant did not confirm or approve the matters set out in the 20 August 2018 letter.

[21] Also on 20 August 2018, KPPS prepared two cheques for the collection of the plaintiff and defendant: a cheque for RM1,694,593.85 for the plaintiff and another cheque for RM265,584.91 for the defendant. The plaintiff collected its cheque on 20 August 2018 and thus received the payment of RM1,694,593.85 from KPPS ('the KPPS payment'). However the defendant did not collect its cheque.

[22] On 23 August 2018, KPPS sent an email to the defendant enclosing a draft novation agreement dated 19 July 2018 between KPPS, Kuantan Port Consortium the parent company of KPPS, and the defendant ('the draft novation agreement'). En Roslan was asked to sign the draft novation agreement but he did not do so.

[23] On 24 August 2018, En Roslan received minutes of meetings held on 30 July 2018, 6 August 2018 and 15 August 2018 titled 'Splitting of Outstanding payment to Thermatek Sdn Bhd' which were prepared by KPPS ('the minutes of meeting'). By way of a letter dated 25 August 2018 ('the 25 August 2018 letter'), the defendant wrote to KPPS objecting to the minutes of meeting stating that there were several inaccuracies including:

(a) that Item 5 (on the stop-worker order) should include the clarification that the defendant had emailed KPPS on 13 August 2018 (enclosing the plaintiff's demand for payment dated 11 August 2018) asking them to pay the outstanding hire so that the defendant can in turn make payment of oustanding hire due to the plaintiff;

(b) that Item 8 (on balance outstanding due on the TM Global-Thermatek Charterparty) should be amended to place on record that the defendant never provided any facts and figures and asked to go back and verify; and

(c) that Item 9 (on the split payment arrangement) should be amended to place on record that the defendant never agreed to the split payment arrangement and that sums due to them from KPPS should be paid to them directly.

[24] En Roslan also made a formal request for the minutes to be signed by all three parties.

[25] On 30 August 2018, KPPS once again sent En Roslan the draft novation agreement for his feedback. En Roslan replied on 30 August 2018 asking why the draft novation agreement was necessary but did not receive any reply.

[26] KPPS responded to the 25 August 2018 letter via a letter dated 13 September 2018 thanking En Roslan for his explanation on the minutes of meeting and stated that the minutes of meeting 'were summarised matters discussed and decided at the meeting held on 15 August 2018 at Kuantan Port and not a report on the background of the case'. The defendant replied on 24 September 2018 maintaining its stand in the 25 August 2018 letter.

[27] On 20 September 2018, the plaintiff's solicitors, Messrs Joseph & Partners, under the instructions of the plaintiff, issued a letter of demand to the defendant for the sum of RM1,608,301.29 and interest in the sum of RM6,545 ('the letter of demand'). The defendant replied to the letter of demand vide its solicitors, Messrs Kang & Kang, on 9 October 2018 stating that the plaintiff has received payment from KPPS and are now estopped from making any claims or demands to the defendant for sums due under the TM Global-Thermatek Charterparty. The defendant also stated that the plaintiff has committed conspiracy and commercial sabotage.

[28] On 24 April 2019, the plaintiff, through it solicitors, returned the KPPS payment of RM1,694,593.85 in full to KPPS through its solicitors, Messrs HL Lee & Co. The funds were acknowledged receipt by KPPS solicitors on the same day.

[29] Around May 2019, KPPS fully and finally satisfied payment of all sums due and payable to the defendant under the Thermatek-KPPS Charterparty.

[30] The plaintiff's solicitors then wrote to the defendant's solicitors on 6 May 2019 to inform that the sum of RM1,694,593.85 had been returned to

KPPS in full on 24 April 2019 and therefore the defendant was still indebted to the plaintiff for the outstanding sum under the TM Global-Thermatek Charterparty by virtue of this refund. By the same letter, the plaintiff made a further demand for the balance due under the TM Global-Thermatek Charterparty. There was no further response from the defendant.

[31] On 20 June 2019, the plaintiff filed a writ action vide Admiralty in Personam Suit No WA-27NCC-46–06 of 2019 ('Suit 46') against the defendant for, among other things, an injunction for the defendant to hold RM1,658,964.19 pending the disposal of arbitration proceedings. The plaintiff then commenced arbitration proceedings ('the arbitration proceedings') by issuing a notice of arbitration on 26 September 2019. The defendant issued its response to the notice of arbitration dated 4 November 2019.

[32] The defendant applied to stay proceedings in Suit 46 pending disposal of the arbitration proceedings. The defendant's stay application was allowed via an order dated 18 October 2019. The plaintiff had also applied to withdraw Suit 46 altogether. The plaintiff's application was dismissed by an order dated 18 October 201933.

[33] The plaintiff did not proceed with the arbitration proceedings and instead proposed to waive the parties' rights to arbitration and have the dispute between the parties resolved by way of litigation in the High Court in Kuala Lumpur. The defendant agreed to this proposal and parties signed the agreement to submit dispute under charterparty to the Courts of Malaysia dated 4 March 2020. Suit 46 was then discontinued via a notice of discontinuance dated 4 March 2020.

[34] The present suit was then filed on 17 March 2020.

The plaintiff and the defendant's respective cases

[35] The plaintiff's case is that upon a genuine belief that the split payment arrangement was a result of a collective agreement of the parties reached at the 15 August 2018 meeting and that the defendant was in agreement to the split payment arrangement proposal by KPPS, the plaintiff accepted the KPPS payment on or about 20 August 2018. However, subsequently when it became known to the plaintiff that the defendant did not agree to the split payment arrangement and was asserting its claim in full against KPPS, the plaintiff returned the KPPS payment in full to KPPS, through Messrs HL Lee & Co and KPPS on 24 April 2019 has acknowledged safe receipt of the same.

[36] The plaintiff contends that the split payment arrangement was proposed by KPPS as it was in the interest of KPPS for the vessels to continue operating and an agreement had already been reached by parties at the 6 August 2018 meeting, where KPPS had already agreed to settle its debt to the defendant in full. Thus, according to the plaintiff, the split payment arrangement was agreed by the three parties at the 15 August 2018 meeting to expeditiously facilitate due payment of the amounts that were admittedly owed under the TM Global-Thermatek Charterparty and Thermatek-KPPS Charterparty respectively and to allow the work of the vessels to continue without any further interruption. The plaintiff maintains that it was never the intention of the parties to alter their respective contractual positions under their respective charterparties nor prejudice their rights and remedies thereunder.

[37] According to the plaintiff, the delay of about eight months in returning the KPPS payment was because during this time, the defendant commenced the arbitration proceedings against KPPS on its claim in full under the KPPS-Thermatek Charterparty, and because KPPS had already made payment to the plaintiff under the split payment arrangement, this necessitated without prejudice negotiations between the parties regarding the KPPS payment before finally concluding that the plaintiff returns the KPPS payment to KPPS and pursue its claim for the amount of RM1,608,301.29 being the balance charter hire ('the balance charter hire') from the defendant.

[38] The plaintiff's position is that the defendant is still truly indebted to the plaintiff for the balance charter hire and accrued late payment interest under the TM Global-Thermatek Charterparty in the sum of RM1,608,301.29 and claims this sum against the defendant in this action.

[39] The defendant refutes the plaintiff's claim on the grounds that the acceptance of the KPPS payment has discharged the defendant's debt due under the TM Global-Thermatek Charterparty, and further that the plaintiff is now estopped under s 115 of the Evidence Act 1950. The defendant further contends that the refund of the KPPS payment, which was done without its knowledge or consent, cannot in law or equity revive the debt claimed by the plaintiff against Thermatek under the TM Global-Thermatek Charterparty. In relation to this, the defendant maintains:

(a) after Mr Wong became CEO of KPPS in or around July 2018, KPPS began withholding payments to the defendant under Thermatek-KPPS Charterparty and consequently, the defendant struggled to meet its payment obligations to the plaintiff under the TM Global-Thermatek Charterparty;

A (b) despite the 6 August 2018 meeting and the extension contract, KPPS still refused to pay the outstanding amount of RM1,960,178.76 to the defendant. Shortly thereafter, the plaintiff on 13 August 2018, issued the stop-work order against the defendant;

B (c) although at the 15 August 2018 meeting KPPS proposed the split payment arrangement, the defendant did not agree to the proposal as this was never a term agreed discussed or agreed to at the 6 August 2018 meeting;

C (d) the plaintiff and KPPS (through Mr Wong) colluded and conspired without the defendant's knowledge, which led to KPPS making the KPPS payment in August 2018 which contravened the terms of the 6 August 2018 meeting and was made during the validity of the extension contract;

D (e) despite receiving the KPPS payment, the plaintiff by design or mischief, proceeded to issue the letter of demand on 20 September 2018, one month after it received payment from KPPS to which, upon discovering the KPPS payment, the defendant wrote to the plaintiff on 9 October 2018 stating that the plaintiff had been paid by KPPS and therefore, estoppel arose; and

E (f) the plaintiff then lay silent and on 24 April 2019 and some six months later, without the defendant's knowledge, purportedly refunded the KPPS payment to KPPS.

F **[40]** The defendant also counterclaims, founded on the economic tort of conspiracy to injure by lawful means, for damages for loss of charterparty fees and hire of the vessels from 19 August 2018–31 May 2019 on the grounds that the plaintiff, in collusion with KPPS (through Mr Wong) placed the defendant G to a position of financial hardship so that it would default in payments under the TM Global-Thermatek Charterparty and be forced to withdraw from the charterparty and open the opportunity for KPPS to then directly contract with the defendant and exclude the defendant from all further business H arrangements between KPPS and the plaintiff. In relation to this, the defendant maintains:

(a) the plaintiff was fully aware that the defendant was dependent on the payments from KPPS under Thermatek-KPPS Charterparty to make payment to the plaintiff under the TM Global-Thermatek I Charterparty;

(b) the plaintiff and KPPS (through Mr Wong) engaged in a series of acts and omissions to realise and cause injury to the welfare and commercial standing of the defendant by preventing and delaying the payment

under Thermatek-KPPS Charterparty and consequently having the plaintiff issue the stop-work order after the 6 August 2018 meeting and the extension contract;

(c) the plaintiff, KPPS and Mr Wong then continuously attempted to introduce and pressure the defendant into agreeing to the split payment arrangement despite the defendant's refusal and objection;

(d) the plaintiff failed to inform the defendant that it had in fact been paid the KPPS payment in August 2018, and continued to demand from the defendant the amounts due to the plaintiff under the TM Global-Thermatek Charterparty to further enrich the plaintiff and KPPS/Mr Wong at the expense of the defendant;

(e) the plaintiff purported to return the KPPS payment on 24 April 2019, six months after the defendant raised an objection in its letter dated 9 October 2018 to the plaintiff. The plaintiff again continued to demand from the defendant the amount due to the plaintiff under the TM Global-Thermatek Charterparty; and

(f) the plaintiff and KPPS continued to do business in the charter of vessels via the extension contract and beyond to May 2019 due to the goodwill and forced withdrawal of the defendant from Thermatek-KPPS Charterparty.

[41] The plaintiff and KPPS/Mr Wong have benefited from their conspiracy at the expense and detriment of the defendant by effectively having the plaintiff step into the shoes of the defendant in this business arrangement. As a result, the defendant has suffered damages and losses that it would have otherwise earned and/or received as charterparty fees from KPPS from the date of the extension contract on 19 August 2019 up until the final vessel hire in or around 31 May 2019 or such longer time as may be applicable. According to the defendant, had it not been for the conspiratorial actions of the plaintiff and KPPS (through Mr Wong), the defendant would have enjoyed the full benefits of its goodwill with KPPS.

[42] In response to the defendant's allegations of conspiracy, the plaintiff states that these are without basis, maintaining as follows:

(a) the defendant's obligation to pay under the TM Global-Thermatek Charterparty is independent of, and not reliant on whether the defendant is paid or not under its contract with KPPS;

(b) the defendant's payments prior to Mr Wong taking over in July 2018 was already interrupted as even for the May and June 2018 invoices the defendant only made part-payment of the invoices;

(c) the defendant voluntarily agreed to the withdrawal from the Thermatek-KPPS Charterparty;

(d) the plaintiff is not placed in any better position under the extension contract than it enjoyed under the TM Global-Thermatek Charterparty;

(e) the defendant's claims for damages for loss of goodwill, as well as for aggravated and exemplary damages, have no basis; and

(f) the defendant has not denied that its claim against KPPS has been fully and finally settled, nor has it asserted that it has paid the plaintiff the balance charter hire or any part thereof.

ISSUES FOR DETERMINATION

[43] After examining the issues to be tried filed by the respective parties and the submissions, I have identified the relevant issues for this court's determination in this trial as follows:

(a) whether the defendant's debt under the TM Global-Thermatek Charterparty was validly discharged when the plaintiff accepted the KPPS payment from KPPS;

(b) whether the refund of the KPPS payment from the plaintiff to KPPS was a true refund of the KPPS payment and was capable of reviving the defendant's debt to the plaintiff;

(c) whether the acceptance of the KPPS payment by the plaintiff operates as an estoppel against the plaintiff's claim against the defendant for the debt due under the TM Global-Thermatek Charterparty;

(d) whether an adverse inference is to be drawn against the plaintiff pursuant to s 114(g) of the Evidence Act 1950 for not calling Mr Wong of KPPS to prove its claim;

(e) whether the doctrine of laches bars the plaintiff from claiming for the alleged debt under the TM Global-Thermatek Charterparty; and

(f) whether the defendant is entitled to the damages claimed in its counterclaim based on conspiracy to injure by lawful means.

[44] The analysis and findings of the court in this judgment will be structured on the issues above.

ANALYSIS AND FINDINGS OF THE COURT

Whether the defendant's debt under the TM Global-Thermatek Charterparty was validly discharged when the plaintiff accepted the KPPS payment from KPPS

[45] The defendant started off by maintaining that the sum of RM1,608,301,29 which the plaintiff (and KPPS) allege is the amount the defendant owes to the plaintiff was not confirmed or approved by the defendant during the 15 August 2018 meeting. According to the defendant this figure was subject to further verification. To establish this En Roslan testified that the 20 August 2018 letter from KPPS stated that KPPS was informed that the defendant has an amount due of RM1,694,593.85 to the plaintiff which the defendant claimed that it had to check and verify. Also in the 25 August 2018 letter, the defendant expressly stated that the minutes of meeting ought to place on record that at the 15 August 2018 meeting the defendant did not have the figures at hand and said he would need to check. Regardless, the plaintiff and KPPS proceeded to execute the KPPS payment without the defendant's consent or confirmation of the amount.

[46] The defendant maintains that by making the KPPS payment, KPPS, a third party, had performed the obligations of the defendant under the TM Global-Thermatek Charterparty. Additionally, the plaintiff had accepted the KPPS payment as payment towards the TM Global-Thermatek Charterparty. Capt Malim's evidence in cross-examination is that the payment made by the plaintiff to KPPS on 24 April 2019 was a refund of the KPPS payment on 20 August 2018. Thus, by virtue of the KPPS payment, the defendant is discharged from its debt to the plaintiff.

[47] Primarily, the defendant relied on s 42 of the Contracts Act 1950 which provides, 'When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor'. The court was then referred to the cases of *Chinn Swee Onn v Puchong Realty Sdn Bhd* [1990] 1 MLJ 108 (SC) for the proposition that a party cannot enforce its claim against another when a third party had agreed to pay the judgment debt. The court was also referred to the case of *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Jaafar* [1975] 2 MLJ 82 (FC) for the propostion that upon the promisee's acceptance of performance to pay from a third party, the promisor was discharged from any liability to pay the promisee. Another case the court was also referred to is *Punj Lloyd Sdn Bhd v Ramo Industries Sdn Bhd & Anor and another case* [2019] 11 MLJ 574 for the proposition that for s 42 of the Contracts Act 1950 to apply, there must be full, actual performance by a third party of the promisor's obligation and also for the proposition that the promisee is not barred from pursuing against the promisor when the third party had only partially performed the obligation of the promisor and the promisee does not intend to discharge the promisor totally and look to the third party exclusively for the discharge of the promisor's obligation.

[48] The defendant contended that the plaintiff had on 20 August 2018 accepted the KPPS payment as settlement of the defendant's obligations and

Capt Malim has admitted in cross-examination that as at 21 August 2018 (after payment was received) there was no longer a debt owed to the plaintiff. Therefore, by virtue of the KPPS payment, and the plaintiff's acceptance of the KPPS payment, the defendant claims that the defendant was discharged from its contractual obligations for payment under the TM Global-Thermatek Charterparty and on 21 August 2018, the defendant did not owe the plaintiff anything.

[49] The defendant also submitted that based on the principle of accord and satisfaction the refund of the KPPS payment cannot reverse the discharge of the debt. The defendant referred the court to the case of *Amusu Properties Sdn Bhd v Muruchadayah s/o AMS Pillay* [1989] 1 MLJ 451 (HC) which sets out the principle of accord and satisfaction — a contracting party in respect of his obligation towards another is released from such obligation if there is accord and satisfaction between two parties. In this sense the accord is the agreement by which the agreement is discharged and the satisfaction is the consideration which makes the agreement operative. The defendant also referred the court to the case of *Foo Yong v Sui Diong Hoe* [2018] MLJU 1173 (HC) which stated that valuable consideration in 'accord and satisfaction' can take the form of promise to do certain things, in which case the acceptance of the promise will discharge the claim including a surrender of the cause of action given for valuable consideration.

[50] The defendant submits that the plaintiff's acceptance of the KPPS payment means that the debt was duly discharged as an accord and satisfaction made by a third party (KPPS) with the plaintiff and on the defendant's behalf may be subsequently adopted by the defendant, relying on the High Court case of *Gan Kui Lan @ Gan Kee Lan v Chia Kar Loong (No 1)* [2002] MLJU 352; [2002] 7 CLJ 141. As the defendant's debt is a chose in action, once a chose it is discharged, it cannot be revived unilaterally, unless the debtor agrees to revive or to reassign the debt.

[51] The plaintiff, on the other hand, submits that the defendant's debt to the plaintiff is not discharged by the payment from KPPS and the plaintiff is fully entitled to enforce its contractual right to demand payment from the defendant. This was because the defendant is not entitled to rely on the principle of law that payment by a third party discharges a debt when it maintains that it never agreed from the start for KPPS to pay the plaintiff directly.

[52] Before delving into the application of s 42 of the Contracts Act 1950, the plaintiff first referred the court to s 41 of the Contracts Act 1950. Based on this provision when the intention of the parties to the contract was that the promise in the contract (here, to pay the defendant's debt to the plaintiff) was

that it should be performed by the promisor himself (the defendant), such promise must be performed by the promisor or the promisor or his representatives may employ a competent person to perform it. Here, the defendant did not make payment for the debt or instructed KPPS to make the payment on their behalf. In fact, the defendant did not agree to the payment by KPPS.

[53] The plaintiff further submits that there was no agreement between parties to alter their respective contractual positions or rights and remedies under the two charterparties as it was only a payment arrangement of convenience and for expediency's sake to resolve an impasse caused by two existing sets of debts. KPPS merely suggested that instead of them paying the defendant, and the defendant paying the plaintiff, the debt owed to the defendant is split and KPPS would pay the plaintiff what is owed to them directly, and the balance to the defendant so the vessels can continue work uninterrupted. It was not an assumption of the debt by KPPS due to the plaintiff accepted by everyone.

[54] In response, the defendant submits that s 41 of the Contracts Act 1950 is not applicable as it was only the intention of one of the parties (ie the plaintiff) to accept payment from a third party as the plaintiff was happy to accept the KPPS payment from KPPS, by never raising any objection that it was not from the defendant. It was not based on the '… intention of the parties …' as provided under s 41.

[55] I do not find s 41 of assistance to the plaintiff as this provision only sets out who shall perform the obligations under a contract that has been agreed to. Section 41 makes it specific that where the promisor's personal performance is required under a contract, a contract may be performed by a third party on behalf of the promisor. It is not the authority for the proposition a payment to a promisee by a third party not instructed by the promisor to be insufficient for the discharge of the promisor's debt. It is s 42 that deals with whether such a payment discharges the promisor's debt.

[56] On the application of s 42 of the Contracts Act 1950 to the facts of this case, the plaintiff submits that s 42 does not apply as there must be an acceptance by the promisee of the performance of the promise to pay from the third party such that it can no longer enforce their contractual right to demand payment from the debtor. The plaintiff referred the court to the same *Punj Lloyd* case above where it was observed, in addressing the applicability of s 42, that it is not in every case that merely because of some payment arrangements made by a promisor then a promise is said to have released the promisor from its liability to pay. The relevant passage from the *Punj Lloyd* case as decided by Lee Swee Seng J (as he then was) as follows:

A [90] This is not a case where the claimants had agreed to look exclusively to PLL for payments for work done to the exclusion of PLSB. There is no novation of the contract nor a valid assignment of payments that the claimants had agreed with PLSB. The principle of privity of contract applies with full force in that only parties to the contract may sue each other under contract. *Even if payments had come in*
B *reality from another entity in PLL, that, in the absence of a finding of fact of having assumed the legal obligation to pay under the contract, is merely a payment arrangement that PLSB is legally obliged to ensure that it is complied with and that the obligation of PLSB to pay still remains intact under the contract.* It is nothing more than PLSB procuring by conduct that payment shall proceed from its joint venture partner in
C PLL.

[98] The instant case is one where at most there was only an arrangement for payment or what was termed as 'regulating payment' and the contract remained very much one between the claimants and PLSB and that PLSB had not been discharged from their liability to pay. *Mere payment from PLL does not excuse or*
D *absolve PLSB from payment under the contract. It is very much like a situation where the payment had come from the employer of the project direct to the claimants as subcontractors bypassing PLSB as contractor. If PLL does not pay, the claimants could still look to PLSB to pay as their contractual commitment remained intact*. (Emphasis added.)

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[57] The plaintiff highlighted to the court that here, the plaintiff did not agree to look exclusively to KPPS for payment of the debt owed by the defendant under the charterparty and the plaintiff did not enter into any agreement with KPPS to take over and pay the debt owed by the defendant.
F Neither did the plaintiff accept payment from KPPS in place of the defendant, pointing out that there was no novation of the plaintiff-Thermatek Charterparty to KPPS and there was no valid assignment of payments to KPPS that the plaintiff had agreed with the defendant. KPPS did not assume liability for the debt owed by the defendant and the plaintiff did not undertake to
G forbear enforcement in consideration of payment from KPPS.

[58] The plaintiff submits that its rights under the TM Global-Thermatek Charterparty are very much intact and enforceable as it was only concerned about being paid what was outstanding under the TM Global-Thermatek
H Charterparty. The plaintiff maintains that it did not accept the payment from KPPS in substitution of payment by the defendant but only agreed to the apportionment of the payment by KPPS to the defendant for the vessels to continue work.

I **[59]** The plaintiff relied on the *Punj Lloyd* case for the proposition that when there is no assumption of a legal obligation by the third party (KPPS) to pay under the contract it is merely a payment arrangement and that the obligation of the promisor (the defendant) to pay the promisee (the plaintiff) still remains intact under the contract and mere payment from the third party does not

excuse or absolve the promisor from payment under the contract.

[60] The plaintiff further submits that s 42 does not apply as there was no actual performance by KPPS of the defendant's obligation when the KPPS payment was refunded in full. Here, the evidence was that the refund was duly acknowledged and accepted by KPPS and En Roslan admitted in cross-examination that KPPS paid the defendant the debt owed to them pursuant to the arbitration proceedings in May 2019, after the KPPS payment was refunded in April 2019. The plaintiff maintains that the debt would only be irrecoverable from the defendant had the plaintiff retained the KPPS payment and still pursued the payment from the defendant but as the defendant has been settled in full the debt owed to them by KPPS the plaintiff's rights to pursue payment from the defendant remain intact. As the split payment was merely a payment arrangement, KPPS did not assume a legal obligation to pay under the contract and the obligation of the defendant to pay remains intact under the contract.

[61] The plaintiff relied on *Punj Lloyd* to support this submission. In the case, the court observed that there must be actual performance by a third party of the promisor's obligations and if the third party had not fully performed the promisor's obligation, the promisee is not barred for pursuing against the promisor merely because the third party had partially performed the obligation of the promisor where it was not the promisee's intention for the payment to discharge the promisor totally and look to the third party exclusively for the discharge of the promisor's obligation.

[62] The plaintiff also relied on *Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn Bhd & Anor* [1985] 1 MLJ 73 which observed that where there was no agreement for the promisee to accept the third party's performance in place of the promisor, payment by the third party does not discharge the debt. It was also observed by the court that there must be performance before s 42 can apply.

[63] In response, the defendant submits that there was full performance in that payment of the KPPS payment was actually made by KPPS which brought the debt to an end. In this regard there is no requirement for the promisor to have instructed the third party for s 42 to apply as s 42 provides that only acceptance of the promisor is necessary. The defendant pointed out to the court that the plaintiff's conduct of collecting payment from KPPS and sitting on the cash for eight months is not only acceptance but clearly amounted to unqualified confirmation of the debt having been resolved and settled. The defendant also argued that s 42 does not say that it becomes inapplicable when there is a unilateral refund.

[64] The defendant submits that there was performance of the promise for the full obligation as the plaintiff collected the KPPS payment on 20 August 2018 as full and final settlement of the debt the defendant owed the plaintiff. In cross-examination, Capt Malim confirmed that on 20 August 2018 there was a debt but on 21 August 2018, the defendant did not owe the plaintiff anything.

[65] According to the defendant, *Punj Lloyd* is distinguished from this case, which involves monies that had changed hands, as it concerned a fresh claim by the plaintiff for an unpaid CIPAA debt. In *Punj Lloyd* s 42 could not apply as there was no 'performance' of the promise for s 42 to bite on.

[66] The defendant also referred the court to *Seagate Global Trading Sdn Bhd v Pelita Maintenance Resources Sdn Bhd & Ors* [2019] MLJU 1002; [2020] 1 MLRH 6154 (referring to *Chong Hee v Credit Corporation (Malaysia) Berhad* [1999] MLJU 456; [1999] 5 MLRH 782) which held that s 42 did not relieve the promisor from its liability toward the promisee by reason of an executed deed of assignment (the terms of which does not discharge the promisee's debt) as the third party only performed its obligation in part. The result is the promisee was not estopped from bringing an action against the promisor. Only in cases where there is an assignment of a debt that there must be an agreement to absolve the promisee. Because in the instant case there is no assignment of debt and there was full performance which the plaintiff accepted, there is no need for an agreement.

[67] The defendant submits that the fact that there was no agreement for KPPS to substitute the defendant on the defendant's obligations to pay is irrelevant as only if performance was partial would such an agreement be relevant. Where the performance was fully performed an agreement is not relevant. The plaintiff accepted payment based on its conduct and a refund in these circumstances is not capable of reinstating the debt.

[68] Additionally, in the defendant's reply submissions, the defendant submitted that ratification set in as the defendant did not remonstrate any further with KPPS on the split payments when it learned of the KPPS payment being collected by the plaintiff but instead proceeded to sue KPPS for monies owed. The defendant relied on s 149 of the Contracts Act 1950 which provides that where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown the acts and if he ratifies them, the same effects will follow as if they had been performed by his authority. The defendant referred the court to *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303; [1998] 2 MLRA 272 to illustrate how this s 150 is applied.

[69] According to the defendant, KPPS was the agent to the defendant by ratification. The defendant was never paid and never agreed to the split payments but when the plaintiff picked up the KPPS payment, there was implied ratification which is reflected in s 150 of the Contracts Act 1950 which states that ratification may be expressed or implied in the conduct of the person on whose behalf the acts are done.

[70] The plaintiff submits that the cases of *Chinn Swee Onn* and *Haji Nik Ishak* are not applicable. In *Chinn Swee Onn* there was a judgment that had been entered against the judgment debtor and the judgment creditor agreed with a third party introduced by the judgment debtor to pay off the debt by instalments. In *Haji Nik Ishak* the promisee accepted payment from a third party in place of the promisor. The facts of this case are different as there was no assumption of the debt to the plaintiff by KPPS (the third party) as in *Chinn Swee Onn* and *Haji Nik Ishak*.

[71] As for Capt Malim's evidence in cross-examination that there was no debt on 21 August 2021, in re-examination Capt Malim also said that when he received the cheque on 20 August 2018 he said that his debt was settled because at that time he thought that parties had agreed to the split payment arrangement at that time. There was clarification from Capt Malim that 'saya setuju pada tarikh itu'. The plaintiff subsequently discovered that En Roslan did not agree to the split arrangement, which means that the defendant never believed from the start that KPPS assumed any legal obligation on their part to pay under Thermatek-TM Global Charterparty. The defendant's debt cannot be discharged after the plaintiff accepted the cheque on 20 August 2018 when at the same time it have taken a position that no such agreement was reached between the parties.

[72] I start my analysis by stating that the cases referred to me by plaintiff and defendant's counsel which addressed the issue of whether s 42 of the Contracts 1950 is applicable to the facts of this case so as to discharge the defendant from its debt to the plaintiff did not address the peculiar facts of this instant case.

[73] Before I proceed further, for reference, I reproduce s 42 Contracts Act 1950 below:

> 42 Effect of accepting performance from third person
>
> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

[74] What I mean by peculiar facts is this. This is a case where a third party (KPPS) makes a payment to the promisee (the plaintiff) of a sum equivalent to the sum the promisor (the defendant) owed to the promisee, with the

understanding that the promisor was agreeable to this payment, and the promisee then accepted the payment. The sum paid by the third party was part of the sum that the third party itself owed to the promisor. However, the third party and the promisee later realised, due to a belated objection of the promisor, that the promisor did not agree to this payment being made and the promisor actually expected the payment to be made directly to him. The money was then refunded by the promisee to the third party. This set of facts do not arise in any of the decided cases.

[75] The defendant takes the position that by virtue of the KPPS payment and the plaintiff's acceptance of the KPPS payment, the defendant was discharged from its contractual obligations for payment under the TM Global-Thermatek Charterparty pursuant to s 42 of the Contracts Act 1950. The defendant argues, the full payment to the plaintiff and the plaintiff's acceptance was all that is required for s 42 to be applicable. The plaintiff on the other hand takes the position that because the defendant never agreed from the start for KPPS to pay the plaintiff directly, although there was a payment from KPPS to the plaintiff which the plaintiff accepted, s 42 cannot bite.

[76] The cases referred to the court (save for *Chinn Swee Onn* and *Haji Nik Ishak*) decided that for s 42 to apply, there must be full performance by the third party and the promisee accepted such performance. In *Scott & English, Punj Lloyd, Seagate* and *Chong Hee*, the courts held that s 42 did not apply as there was no performance in full by the third party. The defendant says that performance is all that matters for s 42 to apply such as in this case and an agreement for the third party to pay the promiseee was not a pre-requisite.

[77] What can be observed from these cases is although the contention of the promisee being discharged fails due to lack of performance, the courts did also consider whether there was a basis for the payment by the third party being made. However, in *Scott & English, Punj Lloyd, Seagate* and *Chong Hee* the courts did not have an opportunity to consider whether, like in this instant case, full performance in the absence of an agreement for the payment would attract the applicability of s 42 because there was no full performance in these cases. In fact, in these three cases the courts found no agreement existed. Thus when the absence of an agreement is coupled with lack of full performance, the courts had no difficulty in finding that s 42 did not apply. Additionally, in *Seagate* there was an assignment, the terms of which expressly stated that the promisor is not released when payment was not made by the assignee. In that case the court also found that s 42 did not apply when there was no full performance.

[78] From an analysis of the cases, there is no principle exposited that full performance alone without an agreement could attract the applicability of s 42.

This is not surprising as it will be quite rare for payments by a third party to a promiseee to be made with no basis. In my view, this kind of payments cannot happen in a vacuum. That is why in *Scott & English* the court looked into whether there was an agreement to accept the third party's performance in place of the promisee and in *Punj Lloyd*, the court considered whether the promisee had agreed to look exclusively to the third party for payments work done to the exclusion of the promisor. Also in *Chong Hee* and *Seagate* the courts examined the terms of the agreement and the assignment respectively. This was important as in some instances even where there was no performance of the promisor's obligation, the promisor can be discharged based on the terms between parties. In *Chinn Swee Onn* the creditor was not entitled to enforce the claim against the debtor but to proceed against the third party who had agreed to pay the judgment debt. In *Haji Nik Ishak* the promisor was discharged from any liability to pay the promisee as the promisee accepted performance to pay from a third party.

[79] If the defendant's argument that only performance of the obligation and nothing else matters to discharge the promisor is to be accepted, this ignores the effect of payments made by mistake or as a result of fraud, whether or not caused by the promisor. These payments cannot be kept by the promisee and have to be returned. These payments are not made with proper basis and in my view such payments do not discharge the promisor.

[80] Coming back to the facts of this case, the KPPS payment of RM1,694,593.85 was made by KPPS to the plaintiff on 20 August 2018 pursuant to the split payment arrangement where the payment of RM1,960,178.76 by KPPS was split between the plaintiff and the defendant: RM265,584.91 to the defendant and RM1,694,593.85 to the plaintiff. In the 25 August 2018 letter the defendant stated that it never agreed to the split payment arrangement and maintained its position that all amounts owing by KPPS to the defendant should be settled with the defendant and not any other third party. Then it became clear that the defendant did not agree to such a split payment being made. Thus there was no basis for KPPS to make the payment even as a payment arrangement and not pursuant to an agreement for KPPS to substitute the defendant on its obligation to pay the plaintiff. Under the circumstances, s 42 cannot bite as the basis for making the payment was not there in the first place.

[81] The submissions of the defendant in its reply submissions on ratification cannot be accepted. For a start ratification was never pleaded and was not alluded to by En Roslan in his evidence. Neither was Capt Malim cross-examined on this point.

[82] In any event, the defendant's submission that there was implied ratification when the plaintiff picked up the KPPS payment and the defendant Thermatek did not remonstrate any further with KPPS on the split payments is inconsistent with the defendant's objection to the split payment in the 25 August 2018 letter. Suing KPPS is also consistent with the defendant's remonstration as it was the defendant's stated position in the 25 August 2021 letter that all amounts owing by KPPS to the defendant should be settled with the defendant and not any other third party.

[83] Having considered the evidence in its entirety and premised on the above I am satisfied that there was no discharge of the defendant's debt under the TM Global-Thermatek Charterparty when the plaintiff accepted the KPPS payment from KPPS.

Whether the refund of the KPPS payment from the plaintiff to KPPS was a true refund of the KPPS payment and was capable of reviving the defendant's debt to the plaintiff

[84] The defendant contends that the refund of the KPPS payment by the plaintiff to KPPS on 24 April 2019 was not valid or genuine. The defendant says that the refund is dubious because in Suit 46, the plaintiff stated in para 32 of an affidavit in support of an injunction affirmed by Capt Malim on 21 June 2019 ('the injunction affidavit') that the refund was payment for an unrelated contract between the plaintiff and KPPS and that there were disputes between the plaintiff and KPPS which in turn led to the refund. Paragraph 32 reads:

> 32. However, following this agreement, disputes arose between Thermatek and KPPS under the KPPS Charterparty and TM Global and KPPS under a different contact and so it was mutually agreed between Thermatek and TM Global, and TM Global and KPPS, that TM Global returns the sum of RM1,694,593.85 to KPPS and pursue the said sum from Thermatek.

[85] Further, the defendant maintains that the refund was made around the time that the defendant filed the arbitration proceedings against KPPS for the defendant's claim against KPPS which KPPS eventually settled in July 2019 when settlement negotiations with the defendant started in May 2019.

[86] The defendant further submits that as a matter of law the refund in and of itself cannot reinstate the defendant's previous debt. By virtue of s 42 of the Contracts Act 1950 and accord and satisfaction, the plaintiff has accepted the KPPS payment as full payment of the defendant's debt. The defendant did not acknowledge that the refund amounted to a valid and a fresh agreement between the plaintiff and defendant for the plaintiff's refund to be valid in law.

[87] The plaintiff submits that the KPPS payment was properly refunded to KPPS as in the heading of the 24 April 2019 letter from Messrs Joseph & Partners to Messrs HL Lee & Co stated 'Return of RM1,694,593.85 paid pursuant to a Time Charter Contract dated 18 May 2018 between KP Port Services Sdn Bhd and Thermatek Sdn Bhd'. Subsequently Messrs Joseph & Partners issued a letter dated 6 May 2019 to Messrs Kang & Kang which states, 'Without prejudice to the foregoing, we wish to place on record that our Clients have returned the said sum of RM1,694,593.85 in full to KPPS on 24 April 2019'.

[88] Further, para 32 when read in conjunction with paras 33–34 clarifies that the plaintiff refunded the payment to KPPS on the genuine understanding and anticipation that it will be paid by the defendant. The paragraphs read:

> 33. On the genuine understanding and legitimate expectation that Thermatek will pay them the sums due under the TM Global Charterparty, TM Global returned the said sum of RM1,694,593.85 to KPPS through their solicitors, Messrs HL Lee & Co and the funds were duly acknowledged receipt by KPPS solicitors. A copy of my solicitors, Messrs Joseph & Partners' letter to Messrs HL Lee dated 24.4.2019 is appended at [129].
>
> 34. TM Global accordingly claimed the Balance Outstanding Sum from Thermatek with anticipation that they will be paid.

[89] The plaintiff maintains that the defendant knew about the refund, at the latest when it was officially informed by way of Messrs Joseph & Partners's letter of 6 May 2019, about two weeks after the refund was made on 24 April 2019.

[90] The plaintiff further maintains that defendant got paid in full in May 2019 only after the plaintiff refunded the KPPS payment to KPPS in full in April 2019. KPPS would not have paid the defendant without first taking back the payment it paid the plaintiff as KPPS was not obliged to pay the defendant in law. KPPS did not assume the debt due to the plaintiff or agreed to pay it on behalf of the defendant or the said debt was assigned to KPPS.

[91] According to the plaintiff, when the defendant realised that it did not act prudently on their contractual obligations on the TM Global-Thermatek Charterparty and Thermatek-KPPS Charterparty, causing them the loss of the lucrative contract with KPPS and stuck in a legal debt owed to the plaintiff, it decided not to pay the plaintiff. Instead it sued KPPS for the full amount, despite knowing that the plaintiff had taken the payment from KPPS and once it got paid by KPPS, it refused to pay the plaintiff, taking the position that the debt owed to the plaintiff has been discharged the moment the plaintiff accepted the payment from KPPS.

[92] Capt Malim's evidence is that the payment was returned only after eight months because by this time, the defendant had commenced arbitration against KPPS for the full debt and so parties entered without prejudice negotiations to decide how to amicably resolve the matter. It was agreed that the plaintiff refund the payment to KPPS and KPPS will pay the defendant under the arbitration. En Roslan confirmed in cross-examination that the defendant received their payment in full from KPPS in May 2019, after the plaintiff refunded the amount in April 2019.

[93] Capt Malim's disclosure in the injunction affidavit that KPPS had agreed to pay the defendant was not sinister or injurious as this would directly affect the plaintiff's position as the party holding the KPPS payment. The understanding between KPPS, the defendant and the plaintiff was that once the payment from KPPS was refunded, the plaintiff was free to claim this from the defendant.

[94] After considering the evidence and the submissions of counsel I am satisfied that the payment of money RM1,694,593.85 by the plaintiff to KPPS on 24 April 2019 was a genuine refund of the money paid by KPPS to by the plaintiff to KPPS under the split payment arrangement. This was stated in Messrs Joseph & Partners' letter dated 24 April 2019 to Messrs HL Lee & Co. It was not paid for any other reason which is clear from paras 32–34 of Capt Malim's affidavit affirmed on 21 June 2019. At para 33 he stated that 'On the genuine understanding and legitimate expectation that the defendant will pay them the sums due under the TM Global-Thermatek Charterparty, the plaintiff returned the said sum of RM1,694,593.85 to KPPS'.

[95] I also accept Capt Malim's clarification that the payment was returned only after eight months because the defendant had commenced arbitration against KPPS for the full debt and so parties entered without prejudice negotiations to decide how to amicably resolve the matter until it was agreed that the plaintiff refund the payment and KPPS will pay the defendant under the arbitration proceedings which KPPS did in May 2019. Evidence as borne out in the trial shows that KPPS did make the payment to the defendant in May 2019 as admitted to by En Roslan in cross-examination which supports Capt Malim's evidence that parties entered without prejudice negotiations in respect of the arbitration proceedings.

[96] On the issue of whether the refund would have the effect of reviving the defendant's debt to the plaintiff, I do not view this as a relevant consideration of the court. It is the court's finding above that the defendant's debt to the plaintiff was not discharged pursuant to s 42 of the Contracts Act 1950 and under the doctrine of ratification, thus there is no question of reviving the debt which was never discharged. However, the issue of whether the refund is

genuine by itself is relevant as it is an issue for consideration in the defendant's counterclaim under conspiracy which will be addressed further below.

Whether the acceptance of the KPPS payment by the plaintiff operates as an estoppel against the plaintiff's claim against the defendant for the debt due under the TM Global-Thermatek Charterparty

[97] The defendant submits that the doctrine of estoppel precludes the plaintiff from reinstating the discharged debt. In relation to this the defendant maintains that:

(a) the defendant has consistently maintained that it never agreed or consented to the split payment arrangement. At the 6 August 2018 meeting the defendant only agreed that the outstanding amount due to the defendant would be settled directly by KPPS and KPPS will contract directly with the plaintiff for the supply of the vessels via the extension contract;

(b) the defendant did not agree to the suggestion of splitting payments as it only arose in the 15 August 2018 meeting, and the defendant did not agree to it. The defendant took the same consistent position taken by the defendant in the 20 August 2018 letter and the 25 August 2018 letter. In cross-examination En Roslan also stated that he did not agree to the minutes of meeting which stated that the split payment arrangement and the figures were agreed and wrote another letter dated 24 September 2018 saying he maintained his position that the minutes of meeting were not correct and he did not agree to the split payments; and

(c) the plaintiff and KPPS proceeded with the KPPS payment which the plaintiff accepted and by virtue of the plaintiff's acceptance, the debt against the defendant was extinguished.

[98] The defendant submits that it would be unjust for the plaintiff to effect a refund to KPPS without the defendant's knowledge or consent once the debt has been discharged. In support of this argument, the defendant relied on *Boustead Trading (1985) Sdn Bhd Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331 (CA) and *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189.

[99] The defendant submits that s 115 of the Evidence Act 1950, the application of which was explained in *V Veeriah v General Manager, Keretapi Tanah Melayu* [1974] 1 MLJ 201 (HC) operates to estop the plaintiff from reinstating the discharged debt.

[100] Section 115 of the Evidence Act 1950 provides:

A When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

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[101] In *V Veeriah v General Manager, Keretapi Tanah Melayu,* Mohamed Azmi J (as he then was) stated:

Sarkar on Evidence (12th Ed) at page 1033 states that there are seven prerequisites to C bring a case within the scope of estoppel as defined in s 115. It was contended by the defence that all these pre-requisites had been fulfilled, namely:

(1) There must be a representation by a person or his authorised agent to another in any form-a declaration, act or omission.

(2) The representation must have been of the existence of a fact and not of D promises de futuro or intention which might or might not be enforceable in contract.

(3) The representation must have meant to be relied upon, ie it must have been made under the circumstances which amounted to an intention causing or permitting belief in another. The proof of the intent might be E direct or circumstantial, eg by conduct.

(4) There must have been belief on the part of the other party in its truth.

(5) There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually F caused another to act on the faith of it, and to alter his former position to his prejudice or detriment.

(6) The misrepresentation or conduct or negligence must have been the proximate cause of leading the other party to act to his prejudice.

(7) The person claiming the benefit of an estoppel must show that he was not G aware of the true state of things. If he was aware of the real state of things or had means of knowledge, there can be no estoppel.

[102] The defendant provided an analysis to show why the plaintiff's actions H are caught by estoppel and submits that the seven pre-requisites in *V Veeriah* are satisfied:

(a) pre-requisite (1) (representation to the defendant in the form of an act) is satisfied as KPPS and the plaintiff executed the KPPS payment;

I (b) pre-requisite (2) (representation is of the existence of a fact) is satisfied as the KPPS payment took place on 20 August 2018 and the plaintiff collected it;

(c) pre-requisite (3) (the defendant's reliance upon the representation) is satisfied as in the 6 August 2018 meeting there was an agreement that

A

the defendant would get paid and it therefore agreed to the extension contract. Instead KPPS made the KPPS payment to the plaintiff as payment towards the debt owed by the defendant to the plaintiff which was accepted by the plaintiff, reneging on the agreement. The defendant was left unpaid by KPPS and took legal action against KPPS. The defendant did not accept the KPPS payment as payment of its debt as the amount a reduced amount, contrary to the agreement by parties in the 6 August 2018 meeting;

B

(d) pre-requisite (4) (the defendant's belief in the truth of the representation) is satisfied as the defendant believed that the KPPS payment was full and final settlement of its debt to the plaintiff and the plaintiff accepted the KPPS payment as full and final settlement of the claim the plaintiff had against the defendant. Subsequent to that the defendant did not hear from the plaintiff for six months;

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D

(e) pre-requisite (5) (the defendant's action on the faith of the act) is satisfied as the defendant took legal action against KPPS when KPPS reneged on the agreement reached by parties in the 6 August 2018 meeting. Furthermore, the letter of demand was responded to by the defendant to confirm the plaintiff had already received the KPPS payment discharging the defendant's debt;

E

(f) pre-requisite (6) (conduct leading the defendant to act to its prejudice) is satisfied as the KPPS payment and the plaintiffs acceptance of it caused the defendant to make no further payments to the plaintiff under the TM Global-Thermatek Charterparty, compelling the defendant to take legal action against KPPS as the defendant was left in the lurch with no payment; and

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(g) pre-requisite (7) (the defendant was not aware of the true state of things) is satisfied after the defendant indicated that it did not agree to the split payments and formally objected to it via the defendant's letter of 25 August 2018, the defendant was not informed prior to the plaintiff collecting the KPPS payment nor was the defendant consulted on the refund of the KPPS payment.

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H

[103] The plaintiff submits that prerequisites to bring a case within the scope of estoppel under s 115 as explained in *V Veeriah* have not been fulfilled. As the defendant's pleaded case is that it never agreed to the split payment arrangement in the first place and went on record to maintain this in the 25 August 2018 letter, it did not believe or rely upon this arrangement or act on belief or reliance on this and alter their former position to their prejudice or detriment. Instead, the defendant enforced its rights on the debt owed by KPPS by way of arbitration after being paid in full.

I

[104] The plaintiff further submits that the defendant did not believe that KPPS had paid in full under the split payment when the defendant brought arbitration proceedings against KPPS for their unpaid claim after the split payment. The defendant's actions in commencing the arbitration proceedings for RM1.96m is evidence that it did not believe the split payment arrangement was a discharge of debt with the plaintiff. Capt Malim's evidence is that after the defendant commenced arbitration proceedings there were without prejudice discussions between the relevant parties to resolve the split payment from KPPS. The plaintiff returned the money to KPPS and sued the defendant under the TM Global-Thermatek Charterparty as the split payment issue was not resolved.

[105] On whether the defendant was aware of the true state of things the plaintiff maintains that the defendant was aware as it had the minutes of meeting and letters from KPPS dated 20 August 2018 and 13 September 2018. Subsequently, it knew about the refund by the plaintiff to KPPS vide the letter dated 6 May 2019 from Messrs Joseph & Partners to Messrs Kang & Kang.

[106] Upon considering the evidence, I accept that the defendant has not satisfied the prerequisites to bring a case within the scope of estoppel under s 115 of the Evidence Act 1950 as set out in *V Veeriah v General Manager, Keretapi Tanah Melayu*. The court, in applying the opinion in *Sarkar on Evidence* stated there are seven prerequisites to bring a case within the scope of estoppel as defined in s 115. All prerequisites must be satisfied by the defendant but it has not successfully achieved this in some major parts.

[107] The defendant did not agree to the split payment arrangement and did not believe or rely upon this arrangement. The defendant also did not act on its belief or reliance on this and alter its former position to its prejudice or detriment. This is apparent from the defendant's pleaded case and the 25 August 2018 letter stating that it did not agree to the split payment arrangement.

[108] The defendant cannot be said to have believed that KPPS had paid in full under the split payment arrangement. This was borne out from the defendant's conduct after the payment. The defendant brought the arbitration proceedings against KPPS for its unpaid claim of RM1.96m. After the defendant commenced the arbitration proceedings there were without prejudice discussions between the relevant parties to resolve the split payment from KPPS which were not resolved.

[109] Capt Malim's belief that the defendant's debt was discharged when the payment was made by KPPS to the plaintiff is not sufficient as the defendant must also have believed the same, which they did not.

[110] The defendant was aware of the true state of things as they had the minutes of meeting and letters from KPPS dated 20 August 2018 and 13 September 2018. The defendant also knew about the refund by the plaintiff to KPPS vide a letter dated 6 May 2019 from Messrs Joseph & Partners to Messrs Kang & Kang.

Whether an adverse inference is to be drawn against the plaintiff pursuant to s 114(g) of the Evidence Act 1950 for not calling Mr Wong of KPPS to prove its claim

[111] The defendant submits that Mr Wong of KPPS was an important and material witness to the case as he played a key role in the events leading up to this suit where he was present at the 6 August 2018 meeting and the 15 August 2018 meeting and has personal knowledge of the events that took place and their context. Mr Wong was also the signatory to several material correspondences between the defendant and KPPS including but not limited to the minutes of meeting. In cross-examination Capt Malim confirmed that evidence regarding the 6 August 2018 meeting and the 15 August 2018 meeting was important to him. Mr Wong was listed as one of the plaintiff's witnesses for this trial which was confirmed by Capt Malim in cross-examination he and stated that Mr Wong refused (using the word 'enggan hadir') to attend court for the trial.

[112] The defendant also submits that even if Mr Wong refused to testify at the trial of this matter, the plaintiff ought to have issued a subpoena against him to compel his attendance given that there were serious allegations made against him and KPPS in this suit.

[113] The defendant further submits that there is an implied admission of this weakness in the plaintiff's case because Mr Wong, having been on the plaintiff's witness list, refused to attend. The defendant went on to suggest that the plaintiff did not dare subpoena Mr Wong. The defendant put forward the proposition that if Mr Wong attended and had spoken the truth this may have exposed Mr Wong to serious wrongdoings and possible criminal conduct, thus Mr Wong chose to stay away completely, knowing that the plaintiff would not risk subpoenaing him as a hostile or unfriendly witness.

[114] The defendant thus submits that an adverse inference ought to be drawn against the plaintiff pursuant to s 114(g) of the Evidence Act 1950 for failing to call Mr Wong of KPPS to testify at the trial of this matter. The defendant relied on *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC) to support the submission that adverse inference may be drawn against a party that withholds an important and material witness to the case.

[115] The plaintiff maintains that the non-attendance of Mr Wong and Dato' Tan as witnesseses for the plaintiff is not significant, thus the court ought not draw an adverse inference against the plaintiff pursuant to s 114(g) of the Evidence Act 1950.

[116] The plaintiff conceded that it did ask Mr Wong to come but he was reluctant but maintains that even if Mr Wong 'enggan hadir' the court should not draw an adverse inference as the plaintiff has the right and liberty to call who they want to prove their case at trial. The plaintiff contended that although it included Mr Wong in the plaintiff's list of witnesses but in preparing its case for trial it found that the plaintiff's case can be satisfactorily proved on contemporary documents adduced in court. Thus, the plaintiff decided not to call Mr Wong as a witness since it was not obligated to produce him at trial.

[117] Capt Malim also explained in re-examination that Dato' Tan handles the accounts part of the company, and as Managing Director who was personally involved and hands-on the operations of the company, Capt Malim himself was better suited to testify on the matter. The plaintiff submits that what needed to be produced and proved to discharge its burden of proof could, and was done through Capt Malim.

[118] On the issue of issuing a subpoena to Mr Wong, the plaintiff submits that either party could have taken a subpoena to force Mr Wong to come to court. Since the defendant thought that Mr Wong was so important, it should have called him as its witness and had every reason to call Mr Wong as a witness too since it had a dispute with KPPS and a counterclaim in this suit.

[119] In this part of this judgment I am addressing the issue of adverse inference to be drawn against the plaintiff in not calling Mr Wong only in respect of the plaintiff's claim in the original action. I will address this issue in respect of the defendant's counterclaim further below. I also note that for the original action the defendant did not submit specifically on the non-calling of Dato' Tan by the plaintiff except in a minor reference at para 80.2 of the defendant's written submissions.

[120] In the original action, the main issue is whether the KPPS payment discharged the defendant's liability to the plaintiff. The defendant had already taken the position that the payment was in full so there is no dispute there. Thus the central issue was whether there was any basis or agreement for the payment as a prerequisite for s 42 of the Contracts Act 1950 to apply. This involved a legal analysis rather than proof of facts for which evidence of witnesses are crucial. The circumstances of why KPPS paid the plaintiff was

fully explained by the plaintiff's witness, Capt Malim. The defendant has not explained why Mr Wong's evidence would be important in this respect.

[121] I thus agree with the submission of the plaintiff that the plaintiff's case can be satisfactorily proved on contemporary documents adduced in court as what needed to be produced and proved to discharge its burden of proof could, and was done through Capt Malim and available documents. See *Sarkar Law of Evidence* (2nd Malaysian Ed) at p 3129:

> In the circumstance whereby the fact in issue can be decided based on the documentary evidence presented before the court, there is no necessity to draw an adverse inference against a party for failing to call a witness to court to give oral evidence in support. See the case of *Techbay Sdn Bhd & Ors v Medicbilt Sdn Bhd And Another Appeal* [2019] 5 MLJ 754; [2019] 1 LNS 361 whereby the fact in issue was whether there was payment of lobbying fees. Here the Court of Appeal affirmed the decision of the High Court in deciding that there was no necessity to draw an adverse inference pursuant to s 114(g) as the learned judge had reached his conclusion that the lobbying fees were paid by referring to the documentary evidence that provided details of the funds, mode of payment, date and other details of monetary transactions to lobbyist and other payments.

[122] Thus, no adverse inference shall be drawn against the plaintiff for the non-calling of Mr Wong as its witness to prove its claim.

Whether the doctrine of laches bars the plaintiff from claiming for the alleged debt under the TM Global-Thermatek Charterparty

[123] The defendant submits that the doctrine of laches bars the plaintiff from reviving the alleged debt under the TM Global-Thermatek Charterparty as the plaintiff only effected the refund of the KPPS payment on 24 April 2019, some eight months after it received the payment on 20 August 2019. This was confirmed by Capt Malim in cross-examination. At the time of the refund of the KPPS payment, the plaintiff gave no explanation or justification to the defendant of this purported refund.

[124] The defendant referred the court to the Court of Appeal cases of *Eagaivallinayagi Ammal v Chin Min Hua & Ors* [2020] 2 MLJ 771; [2020] 4 CLJ 64 and *Sha Kannan & Anor v Arunachalam a/l Venkatachalam & Anor and another appeal* [2017] MLJU 1568; [2017] 1 LNS 2036 to support the argument that the doctrine of laches is applicable when there is an unexplained delay in commencing legal actions.

[125] However, the submissions of the defendant on laches cannot be accepted. Like the issue of ratification this was never pleaded and was not alluded to by En Roslan in his evidence. Neither was Capt Malim cross-examined on this point.

[126] In any event, this is not a case where the defendant could lose evidence, witnesses, and a fair chance to defend itself after the inevitable passage of time from the date the alleged wrong or breach was committed as decided in *Eagaivallinayagi Ammal v Chin Min Hua*. The eight months it took for the plaintiff to refund the money was not a long time and after the refund in April 2019, the plaintiff started the arbitration proceedings against the defendant before changing the forum of the dispute to the Kuala Lumpur High Court. Also Capt Malim adequately explained the delay which was caused by parties in without prejudice discussions when the defendant sued KPPS for the full amount.

Whether the defendant is entitled to the damages claimed in its counterclaim based on conspiracy to injure by lawful means

[127] Before considering the evidence and submission of the defendant and the plaintiff, it is useful and relevant to consider the law relating to the tort of conspiracy to injure by lawful means.

[128] The Court of Appeal speaking through Mohd Zawawi Salleh JCA (as he then was) in *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797; [2016] 3 CLJ 676 set out the elements of the tort as follows:

> [10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the 'economic torts'. There are four elements to a conspiracy claim:
>
> (i) a combination or agreement between two or more individuals;
>
> (ii) an intent to injure;
>
> (iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and
>
> (iv) resulting loss and damage to the claimant.
>
> (See *Khoo Teng Chye v Cekal Berjasa Sdn Bhd & Anor* [2015] MLJU 992; [2015] 6 CLJ 449 (CA)).
>
> [11] There are two kinds of conspiracy, the elements of which are distinct:
>
> (i) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and

(ii) lawful means conspiracy: a combination to perform acts which, although not themselves per se unlawful, are done with the sole predominant purpose of injuring the claimant-it is in the fact of the conspiracy that the unlawfulness resides. (See *Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-europe Forum Berhad, Natasha Zulkifli & Anor* [2011] MLJU 452; [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393; [2010] 9 CLJ 389 (CA)).

[129] In *Deepak Jaikishan a/l Jaikishan Rewachan & Anor v Intrared Sdn Bhd & Anor* [2013] 7 MLJ 437 Nallini Pathmanathan J (as she was then) held:

> [101] The established/acknowledged series of cases which have defined the salient characteristics of the law of conspiracy may be summarised as follows:
>
> The tort of conspiracy to injure is delineated into two categories, namely 'unlawful means' conspiracy and 'lawful means' conspiracy. The label 'unlawful' signifies that unlawful means comprise an element in the cause of action. However, central to this tort, albeit 'unlawful' or 'lawful' means conspiracy, is the continuing requirement of a demonstration of an intent by the defendant to injure the claimant In 'lawful' means conspiracy the reguirement is that such intent be predominant in the mind of the defendant whereas in 'unlawful means' conspiracy that requirement is replaced by the reguirement to show that unlawful conduct has been the means of the intentional infliction of harm to the claimant.

[130] What the defendant is required to establish to discharge their burden of proof is to establish conspiracy to injure the defendant by lawful means are thus:

(a) proof of an agreement and/or a combination of efforts of the conspirators to injure the defendant. Such an agreement or combination may be in writing or by word of mouth;

(b) there were acts committed to execute the agreement or combination to injure the defendant;

(c) the defendant has suffered damage due to acts done in execution of the agreement or combination to injure them; and

(d) there was a predominant purpose or intention of the conspirators to injure the defendant.

[131] The defendant submits that the plaintiff, in collusion with KPPS through Mr Wong have taken deliberate steps to damage the defendant's economic interests for its own gain to the extent where the defendant had no choice but to withdraw from Thermatek-KPPS Charterparty. The defendant maintains that there was a conspiracy to injure the defendant by lawful means

as there was an agreement between two or more individuals, namely the plaintiff and KPPS through Mr Wong, with an intent to injure the defendant by ousting the defendant out of the contracts the defendant had with KPPS and with the plaintiff, and that this resulted in loss and damage to the defendant. The defendant submits that viewed as a whole, the plaintiff and KPPS's actions demonstrate their concerted attempts to exclude the defendant from this business arrangement. En Roslan testified that the plaintiff and KPPS wanted to contract the plaintiff directly and created a situation where the defendant was in default with the plaintiff leading to the extension contract and withdrawal of the defendant from the plaintiff's contract with the defendant.

[132] The defendant contended that the plaintiff, KPPS and Mr Wong's collective efforts satisfy the four elements of conspiracy set out in *Cubic Electronic*, summarised as follows:

(a) once Mr Wong became CEO of KPPS, KPPS started to delay payments to the defendant under the Thermatek-KPPS Charterparty which led to the stop-work order being issued. The defendant had no payment issues with KPPS under the previous CEO. En Roslan also had a good track record with the previous CEO but not with Mr Wong;

(b) the absence of Dato' Tan, the Executive Director of the plaintiff, who was a key player the conspiracy is suspicious;

(c) from as early as 27 July 2018, when invites for the meeting on 30 July 2018 were sent, it appeared that the plaintiff and KPPS were involved in discussions to the exclusion of the defendant;

(d) the plaintiff and KPPS met on 30 July 2018 and discussed matters pertaining to the TM Global-Thermatek Charterparty without the defendant;

(e) at the 6 August 2018 meeting the plaintiff, KPPS and Mr Wong caused the plaintiff to agree to the extension contract on the condition or pretext that the defendant would be paid directly by KPPS, as testified by En Roslan in cross-examination; and

(f) the extension contract was already drafted and finalised for the defendant's review and approval at the 6 August 2018 meeting without being discussed or negotiated with the defendant beforehand, as stated by En Roslan in Q&A No 41 of WS-DW1.

[133] According to the defendant, the facts show that there was an agreement between KPPS, Mr Wong and the plaintiff that was aimed at ousting the defendant of the deal and having the plaintiff benefit from the extension contract first, then once that was achieved, to impose the split payments on the

defendant who was no longer in any bargaining position. The only possible motive possible for the actions of KPPS, Mr Wong and the plaintiff was for the plaintiff to gain significantly by the orchestrated events. It was stated by Capt Malim that the plaintiff got minimum net profits of approximately RM2m in the extension contract.

[134] The events following the withdrawal of the defendant from the Thermatek-KPPS Charterparty were also relied on by the defendant to show that there was conspiracy to injure the defendant by lawful means. These are further summarised as follows:

(a) in the 15 August 2018 meeting, the plaintiff and KPPS backtracked on the terms agreed to in the 6 August 2018 meeting, and for the first time introduced the split payment arrangement, which the defendant did not agree to;

(b) when the defendant refused to agree to split payment arrangement and despite the defendant's express objections in the 20 August 2018 letter and the 25 August 2018 letter, the plaintiff, KPPS/Mr Wong proceeded to attempt to indirectly cause the defendant to agree to the split payment arrangement as testified by En Roslan in his cross-examination;

(c) when these attempts failed, the plaintiff, KPPS and Mr Wong then surreptitiously executed the KPPS payment without the defendant's knowledge or consent;

(d) after executing the KPPS payment, and despite the plaintiff being in receipt of the full amount owed to it by the defendant, the plaintiff then issued the plaintiff's letter of demand to the defendant to double claim from the defendant;

(e) although in Capt Malim's cross-examination he claims that the letter of demand was issued to allegedly 'reserve the rights' of the plaintiff, there is no mention of this in the letter as admitted by Capt Malim in cross-examination;

(f) the letter of demand was a clear and unequivocal demand for payment from the defendant when in fact, plaintiff had already received the KPPS payment, demonstrating that the demand was an afterthought and a belated attempt justify the plaintiff's wrongdoing.

(g) unbeknownst to the defendant and without the defendant's consent, the plaintiff then refunded the KPPS payment to KPPS and attempted to unilaterally reinstate the debt owed by the defendant to the plaintiff, and filed this action;

(h) the refund on 24 April 2019 was done eight months after the plaintiff took the payment and six months after being put on notice by the defendant's solicitors that the defendant was aware that the plaintiff had

A been paid. The refund on 24 April 2019 was only made just before the defendant's claim against KPPS was settled on or about May 2019; and

(i) the refund of the KPPS payment was not a genuine refund and is incapable of reinstating the defendant's position back to being the plaintiff's debtor.

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[135] The defendant relies on circumstantial evidence to prove its case of conspiracy. The defendant submits that the cumulative effect of the evidence against the defendant's conduct with KPPS and Mr Wong and the keeping away of witnesses shows that there was a conspiracy as the plaintiff is in no position to rebut the inference due to the absence of two key personalities, Mr Wong and Dato' Tan. The defendant maintains that the only possible inference from the evidence is that based on a balance of probability it is far more likely and probable that the actions of the plaintiff were motivated by a conspiracy and intent to replace the defendant in the contractual matrix to enrich itself.

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[136] In relation to its submissions on circumstantial evidence the defendant relies on the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 (FC) and *Public Prosecutor v Megat Sharizat bin Megat Shahrur* [2013] 3 MLJ 227 (FC) for the proposition that the standard of proof for the tort of conspiracy in civil matters is on a balance of probabilities and not beyond a reasonable doubt. The defendant also relies on *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1997] 4 MLRH 685 where the court held that a fact in issue may be inferred from evidence of circumstances surrounding an event or offence.

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[137] The plaintiff started off its submission in relation to the issue of conspiracy by submitting that the actions and events that transpired leading to KPPS directly contracting with the plaintiff were a result of the defendant's default and non-performance of their contractual obligations under the law. The plaintiff maintains that its insistence on payment of what was due to them under the TM Global-Thermatek Charterparty was legitimate, lawful and justified. According to the plaintiff, the defendant, as charterer is obliged under the TM Global-Thermatek Charterparty to pay monthly charter hire following agreed terms of the charterparty. If the defendant defaults by non-payment, the plaintiff is entitled in law to enforce payment irrespective of whether it was paid by KPPS or not, whether payment from KPPS was delayed or not or whether it was in a dire financial position without sufficient funds to make payment.

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[138] Further, according to the plaintiff, under the terms of the TM Global-Thermatek Charterparty, the defendant's obligation to pay charter hire to the plaintiff was not dependent on payment received from KPPS and the plaintiff's right to enforce under the TM Global-Thermatek Charterparty is

not dependent on the performance of Thermatek-KPPS Charterparty. The plaintiff had never waived their rights to be paid or rights to enforcement.

[139] The plaintiff argues that the defendant allowed themselves to be in continued breach of their payment obligations to the plaintiff and did not have a genuine intention to pay the plaintiff as it did not take any measures to salvage its commercial position. The defendant did not negotiate with the plaintiff for time indulgence and neither did it enforce its remedies against KPPS for non-payment. The defendant could have suspended performance of the vessels under cl 12(f) of Thermatek-KPPS Charterparty until the balance outstanding hire is paid or negotiated with KPPS for payment to prevent the pulling out of the vessels but did not do so.

[140] The plaintiff disputes that KPPS delayed payments only after Mr Wong took over as CEO after Dato' Hj Khasbullah in July 2018, forcing the defendant to default on its payments to the plaintiff, which caused them to be ousted from the contract with KPPS, and the contract being given directly to the plaintiff.

[141] The plaintiff points out that the defendant was in default of charter hire from day 1, in May 2018, even when Dato Hj Khasbullah, with whom the defendant claims it had cordial business relations, was still in office until 30 June 2018. The May invoice was only paid late in part on 31 May 2018 and the June invoice not paid. Part-payments towards May and June invoices were only made in July. The defendant in the 25 August 2018 letter requested for charter fees for the period of 18 May–17 June 2018 and 18 June–18 July 2018 to be paid so the defendant could make payment to the plaintiff. In cross-examination En Roslan confirmed that there were sums owing since May 2018.

[142] The plaintiff maintains that the defendant was committing a breach of its obligation to pay the plaintiff when it took the stand that it was not going to pay the plaintiff unless it was first paid. En Roslan's testimony in Q&A No 43 of WS-DW1 is, 'I have no guarantee that KPPS will pay me if the defendant pays the plaintiff first ...'.

[143] The plaintiff argues that, although the defendant could have, it did not terminate the TM Global-Thermatek Charterparty for non-payment and pull back the vessels which would have put the defendant in a very serious predicament with KPPS, and in breach of their obligations as owners under the Thermatek-KPPS Charterparty. KPPS would then have been justified to not pay the defendant what was due to them. KPPS would also have good ground not to renew the contract with them and cause the defendant to be liable to KPPS in damages for breach of Thermatek-KPPS Charterparty. En Roslan

A agreed in cross-examination that had the plaintiff done so, this 'would have adversely affected their contractual commitment with KPPS'.

B **[144]** It was therefore sensible, submits the plaintiff, for the three parties who were affected by the defendant's default to meet and amicably resolve the matter. It was necessary to involve KPPS, because the vessels chartered to the defendant were for the ultimate benefit of KPPS, as the project employer and the non-payment issue directly impacted KPPS' rights and position in the matter. In consequence thereof, En Roslan was invited to the meeting on C 30 July 2018 to discuss, inter alia, the non-payment issue under the TM Global-Thermatek Charterparty and the impending expiry on 17 August 2018 by way of an email invitation on 27 July 2018 sent by the plaintiff. En Roslan was copied in the email but in the email his name was mentioned as an invitee.

D **[145]** The plaintiff highlights to the court that although the defendant was in default, and the charterparty was due to expire on 17 August 2018, En Roslan did not take the opportunity to address and resolve these issues or ask for a renewal of the charterparty. En Roslan did not attend the meeting, respond to the email, ask to reschedule to another date or even ask for a renewal of the E charterparty. However, the plaintiff and KPPS did not take the opportunity to plan and make decisions behind the defendant's. Instead they deferred discussion on the issues to another date in En Roslan's absence as stated in the minutes of meeting. The defendant did not send a notice of protest or objection to challenge the meeting, although that it claims that the plaintiff F and KPPS were conspiring.

[146] The plaintiff contends that it was fully entitled, and correct as a matter of law, not to renew the TM Global-Thermatek Charterparty upon expiry on G 17 August 2018 since the defendant was clearly in default. The defendant was obliged under the law to pay the plaintiff, but made no efforts to do so, seek time indulgence or show some assurance of commitment to pay, negotiate an amicable settlement of the outstanding sum or request for any renewal of the TM Global-Thermatek Charterparty upon its expiry on 17 August 2018.

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[147] The plaintiff further contends that there was nothing wrong, unjust or sinister about the 31 July 2018 Notice informing that the plaintiff are not renewing the charterparty. In the same letter the plaintiff offered to discuss the matter if it wished to do so, but there was no response or expression of interest I to discuss coming from the defendant. At this point, although the plaintiff was fully entitled in law to terminate the TM Global-Thermatek Charterparty for non-payment and sue for damages, it decided to not renew the charterparty and allowed it to expire naturally.

[148] The plaintiff maintains that at the 6 August 2018 meeting which all parties attended, the defendant did not show any interest or intention to make good its outstanding payment and continue with the TM Global-Thermatek Charterparty and alsoi did not request for extension of the charterparty. Based on this and since KPPS required the vessels until 18 September 2018, the plaintiff made a commercial proposal to take over the charter directly from KPPS for the defendant to consider and the plaintiff would only proceed if it had no objections. The defendant agreed to the extension contract without coercion and signed the 'Agreement by Thermatek Sdn Bhd' page voluntarily. En Roslan agreed when cross-examined that nobody forced him to sign his agreement.

[149] Although the defendant's pleaded case is that it voluntarily agreed to withdraw from Thermatek-KPPS Charterparty on the condition that KPPS pays them the outstanding due, the plaintiff maintains that, from the defendant's evidence, this was a commercial decision that the defendant took having evaluated their prospects. In Q&A No 43 WS-DW1 En Roslan said that agreeing to exit and agree to the extension contract on condition that KPPS paid the defendant was the safest solution for the defendant. In his re-examination En Roslan said that he had agreed to exit because the circumstances for the defendant was better. In the minutes of meeting it was minuted that En Roslan agreed to the arrangement of the contract extension between KPPS and the plaintiff but expressed that he was not happy with the change.

[150] The plaintiff disputes the defendant's contention that the defendant agreed to withdraw from the TM Global-Thermatek Charterparty and to the extension contract on the condition that it is paid first although KPPS acknowledged the debt due to the defendant and agreed to pay it in full. In relation to this the plaintiff maintains that:

(a) there is no proof of the defendant insisting on payment first as a condition to their agreement as shown in the signing page of the 'Acceptance of Contract Extension', Items 2, 3 and 4 of the minutes of meeting and the 25 August 2018 letter;

(b) KPPS would not be in a commercially confident position to give the one month extension of the contract to the defendant given that on 6 August 2018, the defendant was still in default of payments and had not requested any renewal of the TM Global-Thermatek Charterparty. Thus, the decision of KPPS to give the extension directly was a wholly commercial deal for KPPS;

(c) KPPS was also entitled to decide not to renew their charterparty with the defendant. The Thermatek-KPPS Charterparty was on a one month

basis, with monthly extensions, at the Charterer's option as provided in cl 1(a), Box 9; cl 1(b), Box 10 of Thermatek-KPPS Charterparty;

(d) the extension to the plaintiff only takes effect from 19 August 2018–18 September 2018, which is after the expiry of the TM Global-Thermatek Charterparty on 17 August 2018, which the defendant did not decide to renew; and

(e) based on the defendant's default, the plaintiff was fully entitled to withdraw the vessels for non-payment and issue the 11 August 2018 notice. Out of goodwill, the plaintiff reconsidered its position, and instead issued a suspension or stop-work order on 13 August 2018.

[151] The plaintiff maintains that the 15 August 2018 meeting proposed by KPPS was necessary to resolve the payment of the debt due to the defendant and the debt due to the plaintiff to ensure that there would not be any interruption to the availability of the vessels and the services rendered to Kuantan Port. As the meeting was in the best interest of KPPS as the project employer there is nothing unusual, or wrong with wanting to ensure the quality of services and the efficiency and reputation of Kuantan Port with the port users.

[152] The plaintiff contends that KPPS noted the present non-payment issue between the defendant and the plaintiff which directly impacts the availability of the vessels for the Kuantan Port, thus KPPS proposed an expedient arrangement to resolve payment of the two debts whilst preserving the respective rights of the parties, instead of paying the debt due to the defendant in full and leave it to the defendant to pay the plaintiff what was due to them. The split payment arrangement provides a solution to the defendant's lack of funds to perform its contractual payment obligations to the plaintiff. It makes commercial sense and expediency to split the debt due to the defendant rather than having KPPS first pay the defendant in full, and then the defendant pays what is due to the plaintiff out of that payment.

[153] The plaintiff points out that although the defendant refused to agree to the split arrangement apparently on the issue of quantum, En Roslan did not do a verification exercise with the plaintiff.

[154] The plaintiff disputes the defendant's contention that the plaintiff and KPPS continued with business on the charter of the vessels until May 2019 due to the defendant's goodwill and forced withdrawal from Thermatek-KPPS Charterparty, maintaining that there is no evidence that the plaintiff knew, on or about the 6 August 2018 meeting, that KPPS would require the vessel for a longer period beyond September 2018. The plaintiff argues that if KPPS

decided to continue with the plaintiff beyond September 2018, that was well within its commercial considerations and prerogatives.

[155] The plaintiff maintains that there is no benefit derived by the plaintiff and Mr Wong from ousting the defendant as KPPS would need to charter the vessels and pay a fixed expense for the charter, regardless of whether it is the defendant or the plaintiff providing the vessels. KPPS did not contract with the plaintiff for a lower charter hire price and the extension contract was on the same terms as with the defendant.

[156] The plaintiff drew attention to the court that there is no evidence on how much the plaintiff would have earned on the direct contract with KPPS to prove that the plaintiff derived an unlawful gain from the extension contract. There is only the extension contract for one month on exact terms as the Thermatek-KPPS Charterparty. No contract between KPPS and the plaintiff was produced for the duration of 19 August 2018–31 May 2019, thus there is no evidence of a comparison of how much more the plaintiff would have earned on the direct contract as opposed to the TM Global-Thermatek Charterparty. According to Capt Malim, for the duration after 19 September 2018, the charter hire amount was less than RM1.6m per month, giving an estimate of RM10 to RM11m for eight and half months, which was the contracted amount the plaintiff had to pay the registered owners of the vessels, ASL Marine Contractors for this duration. The plaintiff submits that even if the plaintiff did procure a higher profit through the direct contract with KPPS, this is not in itself evidence of conspiracy.

[157] The plaintiff maintains that the refund of the KPPS payment to KPPS was genuine. As stated in paras 87–93 above, para 32 of the injunction affidavit relied on by the defendant to show that the refund was payment for an unrelated contract must be read should be read together with para 33. The refund was made in a genuine understanding and legitimate expectation that the defendant will pay TM Global the sums due.

[158] Upon considering the evidence and counsel's submissions, I find that the defendant has failed on a balance of probability to prove that the plaintiff, in collusion with KPPS/Wong have taken deliberate steps to damage the defendant's economic interests for its own gain to the extent where the defendant had no choice but to withdraw from Thermatek-KPPS Charterparty. This is based on my findings below.

[159] The defendant's contention that payment from KPPS was good and prompt until Wong took over as CEO of KPPS on 1 July 2018 is not borne out from the evidence. The payment for the May invoice was late and only paid in part, the June invoice was not paid and part-payments towards May and June

A invoices were made in July 2018. The defendant was suffering from late payments from KPPS even before Mr Wong's time.

B **[160]** The plaintiff could have caused more injury to the defendant and delivered the death blow to the defendant in the Thermatek-KPPS Charterparty by terminating the TM Global-Thermatek Charterparty for non-payment and pulling back the vessels thereby causing KPPS not to pay the defendant. This would have assured the non-renewal of Thermatek-KPPS Charterparty and KPPS suing the defendant for damages for breach of Thermatek-KPPS Charterparty. The plaintiff did not do this.

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[161] The intended meeting between the plaintiff, the defendant and KPPS called on 30 July 2018 was a reasonable step to take by the plaintiff to amicably resolve the KPPS non-payment issue as the vessels chartered to the defendant was for the ultimate benefit of KPPS, as the project employer. This was a transparent move for the benefit of all affected parties. There is nothing wrong in the plaintiff calling for the meeting.

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[162] The defendant was invited to the 30 July 2018 meeting by way of the plaintiff's email invitation on 27 July 2018 which was copied to En Roslan to discuss the non-payment issue under the TM Global-Thermatek Charterparty and the impending expiry on 17 August 2018. Although En Roslan did not attend the meeting, the meeting was deferred to discuss the issues to another date with En Roslan present. Thus I cannot accept that the meeting on 30 July 2018 shows that the plaintiff and KPPS were involved in discussions to the exclusion of the defendant.

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[163] The plaintiff was justified in issuing the 31 July 2018 Notice informing that the plaintiff was not renewing the TM Global-Thermatek Charterparty as the defendant was already in default for not paying the plaintiff and the defendant did not attempt to negotiate an amicable settlement of the outstanding sum. The defendant also did not request for any renewal of the TM Global-Thermatek Charterparty upon its expiry on 17 August 2018. The plaintiff did not terminate the TM Global-Thermatek Charterparty for non-payment and sue for damages although it was entitled to do so but allowed the charterparty to expire naturally. The plaintiff's actions here were clearly within the confines of the TM Global-Thermatek Charterparty.

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[164] At the 6 August 2018 meeting attended by KPPS, the plaintiff and the defendant, En Roslan agreed to the plaintiff taking over the charter directly from KPPS without coercion and condition. En Roslan's evidence that nobody forced him to sign the 'Agreement by Thermatek Sdn Bhd' on the KPPS extension of contract letter dated 6 August 2018 indicates that the defendant's withdrawal from the TM Global-Thermatek Charterparty was on a voluntary

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basis. En Roslan in his examination-in-chief and re-examination stated that he agreed to exit and agreed to the extension contract on condition that KPPS paid the defendant. However, there was no proof that En Roslan's agreement to the one month extension to the plaintiff was on the condition that KPPS pays the defendant in full first as borne out in the signing page of the 'Acceptance of Contract Extension', minutes of meeting and the defendant's 25 August 2018 letter.

[165] KPPS's proposal at the 15 August 2018 meeting to resolve payment of the defendant and the plaintiff's respective debts by way of the split payment arrangement was justified considering that this would avoid interruption to the availability of the vessels. I accept that this was an expedient arrangement to resolve payment of the respective debts whilst preserving the respective rights of the parties. This was done at that time on the understanding and belief at that time that the defendant agreed to this arrangement.

[166] The letter of demand was issued after the defendant indicated that it did not agree to the split payment arrangement, necessitating the return of the money paid by KPPS to the plaintiff to KPPS. Thus Capt Malim's explanation that the 20 September 2018 notice of demand was intended to preserve their contractual rights to the debt under the TM Global-Thermatek Charterparty is accepted. The plaintiff only the filed legal action on its claim after it returned the payment to KPPS.

[167] As held earlier I find that the payment of money RM1,694,593.85 by the plaintiff to KPPS on 24 April 2019 was a genuine refund of the money paid by KPPS to by the plaintiff to KPPS under the split payment arrangement.

[168] There is no finding that the plaintiff and KPPS continued with business on the charter of the vessels until May 2019 due to the defendant's goodwill and forced withdrawal from Thermatek-KPPS Charterparty as there is no evidence that the plaintiff knew, on or about the 6 August 2018 meeting, that KPPS would require the vessel for a longer period beyond September 2018.

[169] There is also no evidence before the court that the plaintiff and Mr Wong benefited from the conspiracy alleged by the defendant. The contract extension between KPPS and the plaintiff on 6 August 2018 for one month was on the same terms as with the defendant. There is no evidence on the contract between KPPS and the plaintiff for the duration of 19 August 2018–31 May 2019. It is thus not possible to compare how much more the plaintiff would have earned on the direct contract with KPPS as opposed to the TM Global-Thermatek Charterparty.

[170] None of those facts or circumstances relied upon by the defendant in support of their contentions that the plaintiff and Wong of KPPS had conspired with each other to injure the defendant, taken singly or together, justify or support an inference of dishonest participation by the plaintiff and Mr Wong of KPPS to injure the defendant. There was no reliable evidence provided by the defendant on the alleged conspiracy and the scant evidence provided by the defendant on the conspiracy through circumstantial evidence was just not sufficient for the court to draw an inference that it is far more likely and probable that the actions of the plaintiff were motivated by a conspiracy and intent to replace the defendant in the contractual matrix to enrich itself. In this regard, the more detailed submissions and evidence put forward by the plaintiff to show that the defendant's obligation to pay under the TM Global-Thermatek Charterparty is independent of whether the defendant is paid or not under the Thermatek-KPPS Charterparty, the defendant's payments prior to Mr Wong taking over was already interrupted, the defendant voluntarily agreed to the withdrawal from the Thermatek-KPPS Charterparty and there is no benefit derived by the plaintiff and Mr Wong from ousting the defendant were more compelling.

[171] As for the presumption of adverse inference which the defendant sought for the court to draw from the non-calling of Mr Wong and Dato' Tan in the conspiracy action, I find that the defendant has not sufficiently shown to the court that adverse inference should be drawn in this case.

[172] In the counterclaim, the plaintiff (TM Global) is a defendant and the defendant (Thermatek) as the plaintiff has the burden of proof in its conspiracy action against the defendant. The position in law is that where the burden of proof in a civil case is not on the defendant, his failure to call a material witness would not raise the presumption. See *Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA). In *Sarkar Law of Evidence* (2nd Malaysian Ed) at p 3147 the learned author states:

> The presumption of adverse inference may also be invoked in civil cases. However, where the burden of proof is not on the defendant, his failure to call a material witness would not raise the presumption (*Selvaduray v Chinniah,* [1939] 1 MLJ 253; see also *YK Fung Securities v James Capel (Far East)* [1997] 2 MLJ 621 (CA Kuala Lumpur); *Caley Ototo Worldwide Sdn Bhd v Sun Wen Long* [2009] 9 MLJ 1 (Kuala Lumpur HC) (no adverse inference ought to be drawn against the defendant for failure to call a witness as 'the burden of proof remains with the plaintiff' throughout the trial and that the defendant was in a better position to decide whether he had enough evidence to defeat the plaintiff's claim)). See also *Kejuruteraan Bintai Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd* [2016] 9 MLJ 354 (Shah Alam HC).

[173] Also, an adverse inference may be drawn against the defendant for failure to adduce material evidence only if the plaintiff had, in the first place, proved his case on a balance of probability. In *Thong Foo Ching v Shigenori Ono* [1988] 4 MLJ 585 (CA) Siti Norma Yaakob JCA stated:

> As an option, a defendant need only adduce evidence where he considers that the evidence led by a plaintiff has established the plaintiff's claim on a balance of probability. It is then incumbent upon the defendant to rebut the plaintiff's case by calling evidence on his behalf. In this instance, the appellants had taken the stand that at the end of the respondent's case, the latter had not proved his claims and coupled with PW2's evidence on the admission of evasion of the relevant revenue laws, the appellants considered no rebuttal was necessary and elected not to call any evidence on their behalf. This however, should not be taken as the withholding of unfavourable evidence under (the Evidence Act 1950 s 114 Illustration (g)).

[174] I have already found that the defendant has not proven its case for conspiracy on a balance of probability, thus the non-calling of Wong and Dato' Tan should not be taken as the withholding of unfavourable evidence under s 114(g) of the Evidence Act 1950.

CONCLUSION

[175] In conclusion therefore the findings of this court are that:

(a) the defendant's debt under the TM Global-Thermatek Charterparty was not discharged when the plaintiff accepted the KPPS payment from KPPS;

(b) the refund of the KPPS payment from the plaintiff to KPPS was a true refund of the KPPS payment;

(c) the acceptance of the KPPS payment by the plaintiff does not operate as an estoppel against the plaintiff's claim against the defendant Thermatek for the debt due under the TM Global-Thermatek Charterparty;

(d) the presumption of adverse inference is not to be drawn against the plaintiff pursuant to s 114(g) of the Evidence Act 1950 for not calling Mr Wong and Dato' Tan of KPPS to prove its claim and to defend the counterclaim; and

(e) the defendant has not proved on a balance of probalities its counterclaim based on conspiracy to injure by lawful means.

[176] Therefore the plaintiff's claim in the original action is allowed for the sum of RM1,608,301.29 being the balance charter hire and the defendant's counterclaim is dismissed with costs of RM80,000 ordered against the defendant.

Plaintiff's claim for RM1,608,301.29 allowed; and defendant's counterclaim dismissed.

Reported by Ashok Kumar